Pornography + Prostitution in Canada

Report of the Special Committee on Pornography and Prostitution

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Chapter 4

What is Pornography?

1. Introduction

Among other tasks assigned to it, our Committee was asked to study the problems associated with pornography, including access to pornography, its effects, and what is considered to be pornographic in Canada. The terms of reference for the Committee did not contain any definition of the term "pornography". Although the term is widely used in popular and academic literature, it does not appear in Canadian criminal law, nor is this term used in other federal legislation dealing with the control of offensive material.

Accordingly, we had first to consider whether we would formulate our own working definition of pornography for purposes of the public hearings, so that interested citizens would know exactly what we wanted to hear about. We decided not to publish such a working definition at the outset of our proceedings, because we believed that an essential part of our work was to hear what Canadians thought was encompassed in the term. Therefore, in the Committee's *Issues Paper*, published in 1983 to promote discussion at the public hearings, we included a description of the present terminology used in federal legislation to describe prohibited material, but did not suggest a definition of pornography. At the public hearings, we received many thoughtful and well-reasoned submissions about what should be considered pornography. The main themes of these presentations will be described below.

Firstly, however, let us examine the terminology used in the present law, and discuss the implications of that terminology for public policy.

2. The Definition in the Present Law

The *Criminal Code* does not use the word pornography in its prohibitions dealing with offensive material. Subsections 159(1) and 159(2)(a) deal with the production, distribution and sale of "obscene" matter. Subsection 159(8) provides that for purposes of the *Code*, any publication "a dominant characteristic of which is the undue exploitation of sex, or of sex and any one

or more of the following subjects, namely crime, horror, cruelty and violence" is deemed to be obscene.

Certain other sections of the *Code* also use the term obscene. Section 160 permits the seizure, forfeiture and disposal of obscene material. Section 161 prohibits distributors from requiring retailers to accept for sale obscene materials along with others, in a so-called "tied sale" arrangement.

In some sections, obscene is used in conjunction with other terms. Section 163 creates the offence of presenting or allowing to be presented "an immoral, indecent, or obscene performance, entertainment or representation". Section 164 makes it an offence to use the mails to transmit or deliver anything that is "obscene, immoral or scurrilous".

In all these sections the key test invalues the application of "community-standards". This community standards test developed in response to the use of the term "undue" in subsection 159(8). The question posed by the community standards test is, essentially, whether the exploitation of sex or of sex and crime, horror, cruelty or violence, is undue in the sense that it exceeds the contemporary Canadian community standards of tolerance. As we shall discuss below in greater detail, the application of this test, whether by judges or juries, can make the interpretation of this provision quite unpredictable.

Other provisions of the *Criminal Code* do not use "obscene" at all. Subsection 159(2) of the *Code* makes it an offence to exhibit a disgusting object or an indecent show. Subsection 162(1) makes it an offence to print or publish in relation to any judicial proceedings "any indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals." This use of an injury to public morals test in subsection 162(1) is the only use of such a test in the *Criminal Code* treatment of prohibited materials.

The sections described above feature terminology which is very general. By contrast, a few sections of the *Criminal Code* describe quite particularly the kind of material which will attract the criminal sanction. Take, for example, subsection 162(2). The subsection makes it an offence to publish, in relation to any judicial proceedings for dissolution of a marriage, nullity of marriage, judicial separation or restoration of conjugal rights, any particulars other than the names, addresses and occupations of the parties and witnesses, a concise statement of the charges, defences and countercharges in support of which evidence has been given, submissions on points of law, the summing up of the judge, the finding of the jury and the judgment and observations of the court.

All of the sections dealing with obscene and indecent materials appear in the part of the *Criminal Code* entitled "Offences Tending to Corrupt Morals."

In Schedule C to the *Customs Tariff*[1] we find a prohibition against the importation into Canada of books, printed paper, drawings, paintings, prints, photographs or representations of any kind of an immoral or indecent character. It has been held that this language, too, is to be interpreted on the basis of the community standards of tolerance test. In the guidelines issued to Customs officers to assist in the application of this test, we find a rare use of the actual term pornography. In these guidelines, "hard core pornographic pictures" are described as ones which lewdly and explicitly display the male and female sexual organs, sexual intercourse, sexual perversions and acts like bestiality. Prohibited reading material contains "explicit hard-core fictional text dedicated entirely to sexual exploitation and containing no redeeming features."[2]

Regulations made under the *Broadcasting Act*[3] present yet another variation on this language. The regulations for AM and FM radio licensees provide that no station or network operator shall broadcast anything contrary to law, or any "obscene, indecent or profane language".[4] The comparable regulations for television licensees prohibit broadcast of anything that is contrary to law or any "obscene, indecent or profane language or pictorial representation."[5]

From the foregoing review of the terminology employed in the various legislative provisions aimed at what may be popularly known as pornography, a number of observations can be drawn. One of the clear impressions is of the lack of uniformity in the terminology. However, although there is a diversity of language, it is noticeable that many of the main provisions refer to obscenity or indecency. The title heading in the section of the *Criminal Code* containing most of these provisions makes it plain that these terms, and these offences, deal with what the legislators regarded as "corruption of morals".

3. What is Obscenity?

This Committee has received many interesting and forceful submissions criticizing the use of the term obscene in the present criminal law. The emphasis of this terminology is almost exclusively on sexual morality (or immorality). This emphasis is captured well by this description of obscenity taken from an early Canadian decision: "something offensive to modesty or decency, or expressing or suggesting unchaste or lustful ideas or being impure, indecent or lewd".[6] This interpretation echoes the dictionary definition of obscenity: indecency, lewdness, foulness, loathsomeness.[7] Indeed, as was mentioned in the public hearings, the Latin root of obscenity, "obscenus", means foul, repulsive, filthy, morally impure, or indecent.[8]

The emphasis on sexual immorality is at the heart of United States jurisprudence on obscenity. The touchstone for obscenity is that enunciated in *Miller* v. *California*:

> ...whether "the average person, applying the contemporary community standards" would find that the work taken as a whole, appeals to the prurient interest, ... whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and ... whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[9]

Only material which is within that definition is outside the protection of the First Amendment guarantee of freedom of speech.

However, obscenity has not always been identified with the sexually impure. One of the definitions of its Latin root is "ill-omened, unpropitious"[10], and it has been suggested that its English counterpart originally had only this meaning. In Shakespeare's day, we are told, the term obscene meant primarily "offensive to the senses, filthy, foul, disgusting". Only secondarily did it refer to what was offensive to modesty or decency.[11]

In assessing the terminology used in the present law, these historical antecedents of the meaning of obscene are well worth keeping in mind. The main focus of the law does indeed seem to be on the moral, or sexual, aspect of the definition, but there is still an element of the definition which reflects the more general idea of offence and disgust. Consider, for example, the double elements in the definition of obscene, namely sex and crime, sex and horror, sex and cruelty and sex and violence. In Bill C-19 proposed by the Minister of Justice in 1983, the elements of violence and cruelty were detached from the element of sex, thus emphasizing the dual nature of the obscenity definition. The omnibus bill proposed a new definition of obscene:

> ... any matter or thing is obscene where a dominant characteristic of the matter or thing is the undue exploitation of any one or more of the following subjects, namely, sex, violence, crime, horror or cruelty through degrading representations of a male or female person or in any other manner.[12]

We note that although the sense of obscenity involves both the element of moral impurity and the element of disgust or offence, these two elements are not mutually exclusive. To many, the disgust and offence category is a wide one, capable of including offensive sexual material as well as that which is offensive but not sexual. During the course of our work, we saw an image that most particularly seems to be within this category that is offensive without being sexual. The scene is a highway, located in flat country. Military figures are present, moving about in a purposeless way. A large mechanized vehicle with a roller on the front comes down the road toward the viewer and runs over one of the figures who is standing in its path, with his back to the audience. We see first the grisly scene of the machine rolling over the human being, and subsequently, the gory shape on the road which is all that remains of the victim.[13] There was, to our minds, nothing remotely sexual in content or effect about that scene, and yet it was powerfully offensive.

The Williams Committee has said of the term obscenity that "it principally expresses an intense or extreme version of ... 'offensiveness'".[14] The Report of that Committee continues:

> It may be that it particularly emphasizes the most strongly aversive element in that notion, the idea of an object's being repulsive or disgusting: that certainly seems to be the point when a person or animal is said to be, for instance, "obscenely" ugly or fat. [15]

The Williams Committee, quite rightly in our view, points out that there will be obscene things which are not pornographic, illustrating its remark with the observation that it would be obscene to exhibit deformed people at a funfair, but not, in its view, pornographic to do so.[16]

The Williams Committee also trenchantly observes:

> We suspect that the word "obscene" may now be worn out, and past any useful employment at all. It is certainly too exhausted to do any more work in the courts.[17]

We are strongly inclined towards this view. On the one hand, it seems that the "offence" or "disgust" view of the "obscenity" meaning, with its strong subjective element, may cast the net of the criminal law too widely. It is not everything that disgusts or offends that can or should be prohibited; and even when the *Code* seeks specificity by such formulations as "undue" exploitation of violence or sex and cruelty, it is still, in our view, very sweeping. On the other hand, a focus on sexual morality, either alone or primarily, seems to be missing the essence of what is objectionable about much contemporary material. In the course of our hearings and deliberations, therefore, we found ourselves becoming more and more receptive towards the argument that there should be an overhaul of the terminology used in the *Criminal Code*.

Having reached the point of agreeing that an overhaul is in order, however, we must next address the question of what is more appropriate terminology. Significant numbers of people urged that the term "pornography" be adopted as the keystone of the criminal law, and proposed various quite particular definitions of the term. These recommendations, of course, return us to the discussion with which we began this chapter.

4. What is Pornography?

Even more so than in the case of obscenity, the problem of defining pornography is compounded by the vast and varied popular usage of the term. We suspect that the very sound of the word pornography makes it attractive to those who are describing material that ranges from the "naughty", "racy" or "off-colour" to the "hard-core" depictions of violence and degradation. The abbreviation "porn" seems to be welcomed by many as an addition to the litany of four-letter words, in the company of such stalwarts as "muck", "dirt" and "smut". The versatile prefix "porno" combines well to form such amusing, yet appropriate, terms as "pornokitsch" (for pornography with "artistic" pretensions), pornocrat (an inhabitant of the pornocracy which some see established in contemporary culture) and pornostrasse (a street featuring outlets reserved for the sale of pornographic material).

The very wealth of popular applications for the term pornography points to one very interesting dilemma for those who seek to legislate in this area. Almost everyone could say of pornography, in company with Justice Potter Stewart of the United States Supreme Court, "I know it when I see it".[18]

However, because it depends on the standards and sensibilities of the viewer, such a subjective approach to the definitional task would be doomed to failure in the courts.

In the course of our public hearings, we became aware of the wide range of opinion among Canadians about what is offensive. At what could be called the conservative end of the spectrum are views like those of two witnesses at the Edmonton hearings, who want the legal definition of pornography to include any depiction or occurrence of sexual, physical relations outside heterosexual marriage; and those of REAL Women of Canada whose definition of pornographic contains material setting forth representations or descriptions of a person in a nude or suggestive pose or of sexual intercourse, and the promotion, exploitation, glorification or glamorization of promiscuous conduct. At the other end of the spectrum is one memorable presenter at the Montréal hearings who regarded everything as acceptable (not pornographic), except for sexually explicit portrayals of children and representations of sex with the dead. The majority of views, of course, lay somewhere between these two extremes. We describe them in more detail below.

Many legal definitions of obscenity have attempted to take account of this subjective element by including a judgment factor to be applied by courts in determining what is criminal. The *Criminal Code* of Canada, as has been mentioned, uses the community standards of tolerance test, triggered by the phrase "undue exploitation" in the *Code*; the American jurisprudence also refers to the average person applying contemporary community standards. These formulations attempt to account for the role of taste and sensibility in determining what should be prohibited, while trying to limit that subjective component to the views of the mainstream of the community.

We are not convinced that this sort of accommodation to taste on the subjective element is necessary or desirable in the criminal law. Many people at the hearings criticized the community standards test referred to above as unworkable. We think that this component tells us more about the viewer, or hypothetical viewer, of the material than about the material itself. Although we are concerned that persons not be forced to look at or to consume material which they find offensive, we think that provisions aimed at that problem are a better solution than a definition of pornography which contains as a key element, this subjective approach.

We are not concerned here with refining the popular use and extension of the term pornography. We are, however, concerned about finding a definition which will assist in determining what might properly be the subject of legislative control.

A useful starting point for this inquiry is, once again, an examination of the roots of the term. The Shorter Oxford Dictionary on historical principles describes pornography as a description of the life, manners, etc. of prostitutes and their patrons; hence, the expression or suggestion of obscene or unchaste subjects in literature or art. The term is derived from the Greek words for "harlot" and "writing".[19] These origins should remind us of at least one aspect of "pornography" as the term now is used. The term refers to something "graphic", a representation. An object which is not a representation (underwear, for example) could not be said to be pornographic, whether one is using that term in a popular or a more specialized way.[20]

Our review of definitions of pornography given to us at the public hearings, and in the literature, has led us to the conclusion that there are really two types of pornography being discussed by those who have explored this area. Both of these types are encompassed within this general definition offered by the Williams Committee:

> Pornography essentially involves making public in words, pictures or theatrical performance, the fulfilment of fantasy images of sex or violence. In some cases the images are forbidden acts: so it is with images of violence. In other cases, the line that is transgressed is only that between private and public; the acts represented in the images would be all right in private, but the same acts would be objectionable in public.[21]

The notion of a line between private and public takes its meaning from the fact that it is sexual conduct that is at issue. Pornography is said to cross the line because it makes available for voyeuristic interest some sexual act of a private kind. The act is private to its participants, but cast into the public because of the medium in which it is portrayed.

From this common starting point, however, there is some divergence. One sort of pornography is that which could be said to be merely sexually explicit, with very little emphasis on violence or forbidden (in the sense of illegal) acts. As the emphasis on violence or illegality increases, we move to another type of pornography, described by feminist thinkers such as Jillian Riddington and Helen Longino. The real message of such material is said to be sexual exploitation and degradation of its participants, with portrayal of men as aggressors and women as subordinate.

We divide this material into two types here largely for purposes of discussion. Practically speaking, there can be no real dividing line between the two, since interpretation of a particular image depends to such a great degree on shades of meaning and implication, and on what a particular viewer brings to it. Indeed, some feminist observers say that all pornography, even that which is "merely" sexually explicit, conveys these messages of sexual exploitation and degradation. Consider, for example, the photographs in so-called soft-core pornography involving no representations of violence. It was pointed out that these images may portray women as ever eager to accommodate men's sexual pleasure, with no mind or inclinations apart from that. Their eyes are vacant, their mouths slightly open, so that they look mindless. They are shown as nude or partially clad. Males, when they appear at all, are invariably clothed. Women are not shown in poses of mutually enjoyed sex, but often by themselves, displayed as objects for the male onlooker, who is the reader. Their bodies may be divided into zones or pieces by garter belts, the hems of robes, and so on, so that they resemble the "meat chart" at the grocery store meat

counter. Their pubic areas are often shaved into "acceptable" shapes, and the labia turned back to provide a better display of their sexual organs. All of these images from so-called soft-core pornography are cited by many witnesses as demeaning to women.

The scheme of describing two types of pornography is adopted here merely to facilitate elaboration and description of what it is that people are saying merits, and does not merit, the attention of the law.

The material which is "merely sexually explicit" we see best described by a definition developed by the Williams Committee, which we have modified to a certain extent. The second type of material is well described by Longino, Riddington, and Dworkin and MacKinnon. We discuss each of these approaches in turn.

The Williams Committee proposes as its own working definition of pornography the following:

> ...a pornographic representation is one that combines two features: it has a certain function or intention, to arouse its audience sexually, and also a certain content, explicit representations of sexual material (organs, postures, activity, etc.). A work has to have both this function and this content to be a piece of pornography.[22]

Many people think that pornography has an element of explicit sex to it, suggested by the terms "skin flicks", "nudie magazines" and the like. While somewhat more obscurely, in some minds there is probably also a connection between pornography and sexual arousal. Here again, everyday language is instructive: pornography may be seen as a "turn on", something to "get off on", and so on. The Williams Committee definition does, then, encompass a great deal, if not most, of what the ordinary person would think of as pornography.

For this reason, we think that this definition, with the change which we discuss below, usefully represents one of the types of pornography with which the lawmaker must deal. However, having said that, we nonetheless hasten to point out that from the point of view of the lawmaker, the Williams Committee definition presents a major problem.

The difficulty with the Williams definition as a basis for legislative drafting, is its reliance on an intention to stimulate sexually its consumers, as an element of pornography. We think that the element of sexual stimulation was included in this working definition because of the concern of the Committee for what can be called "the context problem". It was pointed out during the public hearings of our Committee, that an image found offensive in one context, may be quite acceptable in another: a detailed photograph of sexual organs may quite inoffensively be included in a medical textbook, but would offend in a teen movie magazine. A photo of a naked infant being bathed by his or her mother would be acceptable, but a photo of a naked infant, surrounded in a threatening way by leather-clad adults, might not be. In the former case, the issue is about the context in which the photograph appears. In the latter, it is a concern for the context, within the photograph, in which the nude infant is located.

In both cases, persons looking at the photographs will be making certain inferences about what is going on in the photograph and, perhaps, in the mind of its producer. These inferences have a lot to do with someone's determination of whether or not something is pornographic. An observer may infer, for example, that the photograph in the movie magazine is there to arouse the magazine's reader. He or she may infer that the photo of the baby with the leather-clad figures is intended to arouse the reader, at least, in part, because of some other inference, namely that the baby may have something to do with the arousal of the leather-clad figures. Very few observers would infer that the medical book or the photo of the mother bathing her infant, were intended to stimulate sexually the viewer. Thus the impression in the mind of the observer about the presence or absence of intention to stimulate the consumer of the material, will have a bearing on the observer's conclusion about whether material is pornographic. This type of impression is not, of course, the only one which influences the observer's decision about what is pornographic, but it is a significant one.

However, to focus on an intent to promote sexual stimulation as a test in law, simply because it is an element of the "context" analysis, is fraught with difficulty. Our observations of the current market in various types of pornographic material, lead us to suggest that the intent of the makers of most of it has a great deal to do with generating profits, and not very much at all to do with sexual stimulation. Much of this material is stilted, tawdry, and merely gymnastic, and any sexual stimulation connected with it would more likely happen because of the existing mindset of the consumer, than because of the intention of the producer. Any criminal offence which had as a necessary element an intent to bring about sexual stimulation, would, in our view, result in very few convictions. For this reason, we have restricted our use of a "sexual situation" test to only one section of our suggested reforms.

Although we do not think that the Williams Committee definition is an appropriate foundation for the criminal law, we consider that it would be a reasonably popular definition of the sexually explicit sort of pornography. It might be made more exact by the introduction of a small refinement. Thus, we would say that a work is pornographic if it combines the two features of explicit sexual representations (content) and an *apparent or purported* intention to arouse its audience sexually. This formulation is not wholly satisfying because as we have discussed earlier, the emphasis would be on the inference drawn by the observer, and each person's inference would be different. However, to leave only the content branch of the definition means that quite straightforward clinical material in an anatomy textbook would be regarded as pornographic, and that accords with neither the popular understanding nor the proper policies of the criminal law. To depart from an intent standard in favour of an effect standard would not really serve either. If effect were the test, then sexually explicit material which appalled or disgusted

degrading

rather than aroused would not be within the range, even if intent had been to stimulate.

As for our reservations about the definition for purposes of the criminal law, we have created a scheme of criminal law which does not depend on having first of all elaborated a satisfactory definition of "pornography". We have concentrated on identifying the kinds and types of representations which we believe merit a criminal sanction, without striving to attach to one or the other of these types any particular legal or popular label. The terms obscenity, pornography and erotica all have such an elaborate web of primary, secondary and popular meanings, and so many different connotations dependent on the background of the particular person, that we have decided to avoid them for purposes of the criminal law. Similarly, where we believe that context should be taken into account in determining whether to impose a criminal sanction, we have spelled out what we think should be the defence, rather than relying on the presence or absence of an intent to stimulate sexually.

This popular or general definition of pornography, as we have said above, really does not take account of what some persons appearing before us have called "the new pornography". In the terms of the description in the Williams Committee, its images are fantasy images of sex and violence, which involve forbidden acts of violence.

Although these kinds of images might be included in the broad definition, there is almost no real profit in doing so. In fact, to include them would be to submerge them in the general, and to blunt the meaning which these images have assumed in the contemporary pornography debate. Accordingly, we consider it highly worthwhile to study this type of material separately, and to explore the popular definition of it, so that we can understand its implications for lawmaking. The origin of the word pornography in the classical Greek, meaning a description of the life and manner of prostitutes and their patrons, is one point of departure for those who theorize about the new pornography. From this root, it is argued that in pornography, women are graphically depicted as whores by nature. All women are demeaned by such a portrayal, and the humanity and aspirations of all women are circumscribed within this narrow compass.

Helen Longino defines pornography in the sense that we have been discussing. After pointing out that not all sexually explicit material is pornography, nor is all material which contains representations of sexual abuse and degradation pornography, Longino continues:

> What makes a work a work of pornography, then, is not simply its representation of degrading and abusive sexual encounters, but its implicit, if not explicit, approval and recommendation of sexual behaviour that is immoral, i.e., that physically or psychologically violates the personhood of one of the participants. Pornography, then, is verbal or pictorial material which represents or describes sexual behaviour that is degrading or abusive to one or more of the participants *in such a way as to endorse the degradation.* (emphasis in original)[23]

Longino writes that behaviour that is degrading or abusive includes physical harm or abuse, and physical or psychological coercion. She would also classify as degrading "behaviour which ignores or devalues the real interests, desires, and experiences of one or more participants in any way."[24] We were referred to this definition in the course of the public hearings, as well as to a similar formulation by Jillian Riddington:

> a presentation whether live, simulated, verbal, pictorial, filmed or videotaped, or otherwise represented, of sexual behaviour in which one or more participants are coerced overtly or implicitly, into participation; or are injured or abused physically or psychologically; or in which an imbalance of power is obvious, or implied by virtue of the immature age of any participant or by contextual aspects of the representation, and in which such behaviour can be taken to be advocated or endorsed.[25]

This approach to pornography has been given legislative expression in a by-law passed by the City of Indianapolis to control pornography.

The by-law defines "pornography" as follows:

> Pornography shall mean the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that includes one or more of the following:
>
> (1) women are presented as sexual objects who enjoy pain or humiliation; or
>
> (2) women are presented as sexual objects who experience sexual pleasure in being raped; or
>
> (3) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or as dismembered or truncated or fragmented or severed into body parts; or
>
> (4) women are presented being penetrated by objects or animals; or
>
> (5) women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy and inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.[26]

The drafters of the Indianapolis Ordinance, Andrea Dworkin and Catharine MacKinnon, also drafted a by-law for the City of Minneapolis, which was passed by Council but not approved by the Mayor. The Minneapolis by-law includes, besides those elements set out above, these four:

> (i) women are presented dehumanized as sexual objects, things or commodities;
>
> (ii) women are presented in postures of sexual submission;
>
> (iii) women's body parts — including but not limited to vaginas, breasts and buttocks — are exhibited, such that women are reduced to those parts;
>
> (iv) women are presented as whores by nature.[27]

Although these two definitions are framed in terms of depictions of women, both by-laws also provide that the use of men, children or transsexuals in the place of women in these depictions is also pornography.

One of the crucial components of thinking behind these definitions of pornography is the association between pornography and misogyny, or woman-hating. The architects of the Indianapolis by-law, Andrea Dworkin and Catharine MacKinnon, contend that over the ages, the influence of pornography on men who rule societies has produced misogynist institutions. Only now that changes in technology and the market have brought pornography into widespread circulation have we begun to appreciate this connection.[28] Others may argue that misogyny is expressed in pornography, but not created by it. Whichever argument is advanced, there is said to be a clear and unmistakable link between pornography and women-hating.

What is common to both of these approaches in viewing the relationship between pornography and misogyny, is that they see pornography as part of a political problem, relating to power imbalances in society. As such, it is a manifestation of a moral problem, taking the term "moral" in its wider sense, and not merely an issue of sexual morality. The point is made that use of the term obscenity, with its connotations of sexual morality, at best confines the problem too narrowly. At worst, it misstates its essential nature. Accordingly, some of the persons holding this view wish to replace obscenity in the *Criminal Code* with pornography, giving that term a definition consistent with the Dworkin/MacKinnon theory.

In our view, this theoretical approach to pornography (or to the "new pornography") is a valuable contribution to the debate. We think that the shape of the law should be taken not just from the general understanding of pornography expressed in our reworking of the Williams Committee's definition, but also from an awareness of the particular violence to women's aspirations and equality which figures in many of these representations. Again, however, we see some difficulties in completely absorbing into the *Criminal Code* the definitions proposed, particularly the Indianapolis by-law definition. We are concerned about having in the criminal law very broad terms that would cover a wide range of conduct. To criminalize images that present women as commodities would catch much of contemporary advertising, and we think that such an approach to the problems in advertising would be regarded as contrary to the *Charter of Rights* guarantee of freedom of expression: it is not a "reasonable" limit on the right. Similarly, a prohibition on presenting women as whores by nature might be regarded as so vague as to offend the freedom of expression guarantee.

However electrifying these concepts may be in popular or academic thought, it remains inescapable that a regime of criminal law requires more precision and restraint than is in the Indianapolis or Minneapolis by-law definitions. Thus, while we believe that the thinking about the new pornography should influence public policy, we have refrained from incorporating the particular formulations presented to us into our draft legislation. We have, as we discuss below, identified certain kinds of representations which we believe merit the criminal sanction, and have tried to describe these specifically rather than setting out a conceptual definition in the law. We have also recommended changes to the hate literature section of the *Criminal Code* to recognize that pornography may be hate literature directed toward women.

5. Pornography and Erotica

Not all of those who seek changes in the criminal law advocate the use of the pornography terminology and approach as described. They comment within the framework of the existing law, with its emphasis on sexual morality, professing themselves content with the existing obscenity terminology. There is, however, much common ground occupied by those who have complaints about the present law, whether their orientation is toward the use of the pornography terminology or not.

One such area of agreement is to draw a distinction between pornography or obscenity on the one hand and "erotica" on the other. Erotica, as defined by Margaret Laurence, is the portrayal of sexual expression between two people who desire each other and who have entered this relationship with mutual agreement.[29] Gloria Steinem defines the erotic as a mutually pleasurable, sexual expression between people who have enough power to be there by positive choice.[30] Briefs submitted to the public hearings echoed these definitions of erotica.

In the recent decision of Mr. Justice Shannon of the Court of Queen's Bench of Alberta in *R.* v. *Wagner*[31] the court declined to convict the accused under section 159(8) of the *Code* where the videotape in question was erotic. He accepted the definition of erotic presented to the court by Professor James Check, a definition very similar to those of Gloria Steinem and Margaret Laurence given above. In the judge's words, the definition of "sexually explicit erotica" is material which "portrays positive and affectionate human sexual interaction, between consenting individuals participating on a basis of equality".[32] There is no aggression, force, rape, torture, verbal abuse or portrayal of humans as animals. The court found that contempory Canadian community standards would tolerate erotica, so defined, no matter how explicit it might be.

Another slightly different, but entirely compatible, view of erotica is that taken by the Williams Committee. According to them, the erotic is what expresses sexual excitement, rather than causes it. In this sense, the erotic work will suggest or bring to mind feelings of sexual attraction or excitement. Referring back to its earlier definition of pornography as that which intends to cause sexual excitement, the Committee adds that erotic material may cause feelings of sexual excitement and put the audience actually into that state, but if so, that is a further effect. It follows from the Committee's definition, therefore, that what is represented in an erotic work of art need not be just a "milder version" of the pornographic. Indeed, many erotic works of art have no explicit sexual content of any kind,[33] and would thus not be regarded as pornographic at all.

We appreciate this separation of the erotic from the pornographic, and agree with it. We have not, therefore, considered it appropriate to adopt the working definition of pornography proposed by the Badgley Committee: "The depiction of licentiousness or lewdness: a portrayal of erotic behaviour designed to cause sexual excitement."[34]

Many briefs stressed the importance of devising a legal regime which would not criminalize erotica, in order to reach pornography. Some saw the absence of true erotica in the Canadian culture as one reason why young people turn for information about sexuality to magazines and films which teach them that sex is violent and brings pain. Other briefs pointed out that a real harm of pornography is (in the straightforward words of one presenter), that it tells lies about women. Erotica, on the other hand, does not lie about women, or about their sexual partners. Erotic literature or art created by women, it was argued, will do much to counteract the message that is propagated in pornography; it will provide a voice for the expression of what women really are. Not only women, but also men and young people of both sexes will benefit from this development.

We agree strongly that the criminal law should not stifle the development of erotic art. Nor do we want to fashion a criminal law regime that, in the name of protecting women, may serve to silence them. We do not, however, think that including a specific exemption for the "erotic" in the *Criminal Code* is the way to achieve these ends. Once again, while accepting the popular, or non-legal meaning of erotica, and the thinking behind its characterization, we have chosen to avoid the use of the specific term in our draft *Code* provisions. Instead, we have tried to be limited, and clear, about what we seek to expose to a criminal penalty, so that the "chilling effect" of our recommendations on genuine erotic expression will be minimized.

6. Conclusions

We have not tried to distil from the variety of popular meanings a pithy definition of pornography. In the discussions in this Report, we use the term pornography fairly generally and in the popular sense described in this chapter, because we are talking about what people complained to us about. When we come to our recommendations, however, we do choose specific terminology. Whereas we consider that it is natural and inevitable that different understandings of the term will proliferate in the public mind, we have decided to avoid for the most part use of "pornography" for legislative purposes. We are impressed with the variety of meanings attached to the term, and do not wish to import these into a system which we think should be characterized by clarity and certainty. We have similarly decided not to incorporate the term erotica into our recommended provisions. The only exception to this rule occurs in the titles of the sections we have drafted, for there we use the term pornography. It is, in that context, very carefully defined by specifying what sorts of acts are at issue.

For different reasons, we are recommending that the term obscene be retired from the criminal law and related federal legislation. It will simply not encompass the kind of material which is being described as the new pornography, and to rely on the opinion of the hypothetical viewer for its interpretation (the community standards test), introduces an element of subjectivity with which we feel uneasy.

Although we have avoided the formulation of our own brief working definition of pornography, we have been very aware of the two main sorts of pornography which preoccupy those concerned with this issue. Some would say that these are really one type, but in our effort to understand the phenomenon, we have left the apparent distinction as it stands, at least for purposes of analysis. One sort of material is the merely sexually explicit, characterized by both sexual content and an assumed or apparent intention to stimulate sexually the viewer. Missing from this sort of pornography is any appreciable amount of violence and degradation. Again showing the sexual content, but this time in combination with violence, degradation or abuse in such a way as to suggest approval of that abuse, is the second category of pornography. The theoretical underpinnings of our contemporary appreciation of this sort of material are laid by such thinkers as Jillian Riddington, Helen Longino, Andrea Dworkin and Catharine MacKinnon.

We believe that our recommendations must encompass both of these two large, and admittedly loosely defined, areas of pornography. Clearly, not all of it will merit criminal sanctions. Much may attract only regulation; other material will simply be left to individual taste and discretion. If we do not formulate our own precise working definition of pornography, though, there are those who will be wondering on what basis we will make these kinds of distinctions.

As we have mentioned above, our approach has been to try to define as precisely as possible the kinds of images and representations which deserve a criminal sanction, or regulation. We have done this by calling into play the principles enunciated at the beginning of this report. Of all the images and types of images there may be, we have tried to determine which sorts merit the criminal sanction because of the extent and degree of their harm to these principles, which ones may we more appropriately leave to regulation because the nature and extent of their impact may be more in the area of "offence" than of harm, and thus containable by means other than the criminal law; and which should simply be left alone. In coming to our own determinations on these points, we have been very conscious of our debt to those who have struggled with the question of the meaning of pornography, whether we agree with them or not. They have created an intellectual matrix for these discussions which, we venture to suggest, is richer and more challenging than that of a few years ago. We shall describe in some depth in Section IV the provisions which we propose for the criminal law and related statutes. Now let us turn to an examination of what we have been told and what we have learned about the reality of pornography in Canada today.

Footnotes

[1] *Customs Tariff Act*, R.S.C. 1970, c. C-41, as amended.

[2] Revenue Canada, Customs and Excise, Memorandum R9-1-1, Ottawa, July 1, 1982, at Item 28.

[3] *Broadcasting Act*, R.S.C. 1970, c.B-11, as amended by S.C. 1970, c.16 (1st Supp.), s. 42; c.10 (2nd Supp.), s. 65 (Item 2); S.C. 1974-75-76, c.49, s.18.

[4] *Radio (A.M.) Broadcasting Regulations*, C.R.C. 1978, c. 379, s.5(1)(a) and (c) respectively; *Radio (F.M.) Broadcasting Regulations*, C.R.C. 1978, c.380, s. 6(1)(a) and (c) respectively.

[5] *Television Broadcasting Regulations*, C.R.C. 1978, c. 381, s.6(1)(a) and (c) respectively.

[6] *R.* v. *Beaver* (1905), 9 O.L.R. 418 (Ont. C.A.), *per* MacLaren, J.A. at 424.

[7] *The Shorter Oxford English Dictionary on Historical Principles* (3d ed.) (Oxford, The Clarendon Press, 1973) Vol. II, at 1428. For a discussion of the evolution of this dictionary definition, see *Badgley Report* at 1079 and at 1086.

[8] *Cassell's New Latin-English English-Latin Dictionary* (London, Cassell & Company Ltd., 1959), at 403.

[9] 413 U.S. 15 (1973), at 24.

[10] *Cassell's New Latin-English English-Latin Dictionary*.

[11] Law Reform Commission of Canada, Working Paper 10, *Limits of the Criminal Law*; *Obscenity: A Test Case* (Minister of Supply and Services Canada, Ottawa, 1977), at 8.

[12] See s.19 of Bill C-19, 1983.

[13] This scene was contained in the film of "outtakes" from the Ontario Censor Board.

[14] Williams Report, para. 8.4, at 104.

[15] *Ibid.*

[16] *Ibid.*, para. 8.6, at 105.

[17] Williams Report.

[18] *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964), at 197.

[19] *The Shorter Oxford English Dictionary on Historical Principles* (3rd), Vol. II, at 1631.

[20] Williams Report at 103.

[21] Williams Report at 96.

[22] Williams Report at 103.

[23] Helen E. Longino, "Pornography, Oppression, and Freedom: A Closer Look". Laura Lederer, (ed.), *Take Back the Night: Women on Pornography* (Toronto & New York, Bantam Books, 1980) at 29.

[24] *Ibid.*, at 29-30.

[25] Jillian Ridington, *Freedom from Harm or Freedom of Speech?* a discussion paper prepared for the National Association of Women and the Law, Ottawa, 1983. Among those recommending adoption of this definition are the Newfoundland Teacher's Association, the New Brunswick Advisory Council on the Status of Women, and Le Regroupement Féministe Contre la Pornographie, which has translated the definition into French, as follows:

> La pornographie est une représentation réelle ou simulée, en mots ou en images, filmée, sur bande vidéo, ou sous toute autre forme, de comportements sexuels, dans laquelle un-e ou plusiers des participant-e-s sont ouvertement ou implicitement contraint-e-s à cette participation, ou sont blessé-e-s ou molesté-e-s physiquement ou psychologiquement: comportement dans lesquels un déséquilibre de pouvoir est évident ou implicite du fait de l'immaturité en âge de tout-e participant-e, ou du fait de certains aspects du contexte de la représentation; représentation dans laquelle ces comportements peuvent être interprétés comme étant encouragés ou endossés.

[26] City-County General Ordinance No. 24, 1984 (June, 1984), Sec. 16-3(v).

[27] An ordinance of the City of Minneapolis Amending Title 7, Chapter 139 of the Minneapolis Code of Ordinances relating to Civil Rights, 1983, Adding a new section (gg) to Section 139.20.

[28] Memorandum to Minneapolis City Council from Catharine A. MacKinnon and Andrea Dworkin, Re Proposed Ordinance on Pornography, December 26, 1983, at 1.

[29] Margaret Laurence, "On Censorship (A Speech Given to the Ontario Provincial Judges and Their Spouses), Peterborough, Ontario, June 2, 1983 (unpub. Ms.), at 9.

[30] Gloria Steinem, "Erotica and Pornography: A Clear and Present Difference". Laura Lederer, (ed.), *Take Back the Night: Women on Pornography* (Toronto & New York, Bantam Books, 1980) at 23.

[31] 16 Jan. 1985, unreported (Alta Q.B.).

[32] *Ibid.*, at 19.

[33] Williams Report at 104.

[34] Badgley Report, Vol. II, at 1080.

Chapter 5

Views from the Public Hearings

1. Introduction

Any attempt to summarize in a few pages the views presented by hundreds of different organizations at public hearings in 22 different centres across Canada might seem to be an impossible task, doomed to failure, particularly when one considers the wide divergency in the views held by these organizations. Analysis of the briefs submitted at the hearings showed that there is a wide range of opinion among Canadians about what is offensive and what should be considered pornographic.

At the conservative end of the continuum are those who want the legal definition of pornography to include any depiction of sexual activity, whether it be inside or outside of marriage, or any depiction of persons in nude or suggestive poses. At the other end of the spectrum are those who found all pornography acceptable, except for explicit sexual portrayals of children. Between these two extremes, there was a wide range of opinion as to what is acceptable. The position of most feminist groups, and some church organizations, was that erotica, which they described as sexually explicit material which contains no violence or coercion and in which the participants were there by choice, was acceptable. They were totally opposed however, to violent pornography, which they defined as material with a sexual content combined with violence, degradation and abuse, with men shown as the aggressor and women as the subordinate or victim.

Indeed, despite the differences of opinion as to what should be considered pornographic, there was consensus in this area: the question of what should be done about violent pornography. A large majority of presenters expressed strong concerns about the prevalence of violent pornography and urged that government controls be strengthened to ensure that such material is kept off the newsstands and is prohibited on television.

The witnesses and groups favouring controls came from women's organizations, churches and church groups, with a smaller number of community organizations and educational associations, such as teachers' federations in several provinces. There were also a few men's organizations,

which had been set up specifically to oppose pornography, a sprinkling of elected representatives from every level of government, some municipal officials, and some representatives of police forces or police unions.

Opposed to control or censorship of pornography were: firstly, civil liberties groups, some professional associations and film and video organizations; secondly, the Periodical Distributors Association, the Video Retailers Association and a handful of retailers in a few cities; and thirdly, gay rights organizations in major cities.

In its analysis of the briefs from such a wide diversity of organizations, the Committee found that the majority of submissions had concentrated on similar aspects of pornography, although some focus more strongly on certain issues. Large numbers of briefs described the proliferation of pornography in their own communities and many reported on their efforts to control or prohibit its availability, either through the use of municipal by-laws, provincial censorship powers over movies, or local enforcement of *Criminal Code* provisions prohibiting obscene materials.

There was considerable discussion of a new definition of pornography and of the difference between pornography and erotica. Many briefs explored the issue of the link between pornography and violence and supported their positions with local anecdotal evidence, as well as reference to academic research studies, many of which were from the United States.

We received numerous recommendations, some in considerable detail, for changes to legislation at all three levels of government. At the federal level, major changes to the *Criminal Code* provisions on obscenity were proposed, as well as to the *Customs Act*, the *Broadcasting Act* and regulations of the Canadian Radio-Television and Telecommunications Commission. At the provincial level, there were strong suggestions that provincial censorship or classification boards, which now censor and classify movies for public showing, should also deal with home videotapes. At the local level, there was unanimous support for the introduction of municipal by-laws to control the display of pornographic magazines and videotapes so as to keep them out of sight of children.

2. The Prevalence of Pornography

Many groups, in preparing their briefs, had conducted local surveys to determine the type and availability of pornography in their own communities. The Manitoba Advisory Council on the Status of Women reported, for example, that a random survey of 17 local retail stores in Winnipeg revealed that only two of the stores did not sell pornographic material. In the others, the material ranged from two to well over 400 different examples of pornography. The London Status of Women Action Group reported that over 80 percent of local variety stores sell pornography, with many having as many as 100

degradation of men as perpetrators

er the use of government funds and community halls by
ow pornographic movies at club social functions.

eir concern at the increasing amount of violence, both
in pornographic magazines and videotapes, as well as in movies shown in public theatres. The Canadian Federation of University Women, in Toronto, quoted a report from Mary Brown, director of the Ontario Film Review Board which estimated that in 1982 only one film in twenty contained sexual violence. By 1983, it was one film in nine.

The effect of pornography on women, children and on society as a whole was described in sensitive terms by some church as well as lay organizations:

> In recent years, pornographic publications and movies have become more and more explicit as well as more readily available. Pornography victimizes and debases women by portraying them as mere objects, and degrades men by portraying a stereotype of aggression. Pornography increasingly uses children as subjects, and increasingly depicts and incites to violent behaviour.
> *Anglican Diocese of Toronto*

> Pornography does not recognize or celebrate the holistic reality of our humanity, the integration of body, mind and spirit. Pictures and descriptions reduce women to sexual parts, mindless bodies to be played with, poked or even mutilated ... Pornography fails to recognize the wide range of emotions made possible by human encounters ... Pleasure for men is portrayed through acts of inflicting pain or exercising power. Women, supposedly, find pleasure in experiencing pain ....
>
> Pornography promotes racism ... (and) supports and promotes the belief that female sexuality is dirty or evil ... (It) perpetuates the terrible myth that sexual violence is deserved and needed by the normal female ....
> *United Church of Canada, London*

> ... the nihilism of pornography can only be considered as anti-life, harmful to the dignity of people and to the development of sane and lasting personal relationships as the basis of healthy family life. Because it fails to accept sexuality as a unique gift for understanding and for creating new life in the image of another person, pornography is anti-sex.
> *Canadian Conference of Catholic Bishops, Ottawa*

Of particular concern to municipal officials who participated in the public hearings was the difficulty encountered in trying to draft and enforce by-laws to control or prohibit pornography. Additionally, several cities, among them Ottawa, Toronto and Vancouver, complained that the present *Criminal Code* provisions on obscenity are so nebulous and so open to various interpretations, that they are extremely difficult to enforce.

> We have ... a situation in Vancouver where 15 charges of obscenity were laid against an adult entertainment store in January of 1983. The case has been adjourned pending an appeal on yet another case in Victoria where a decision is expected shortly. However, if the Victoria decision finds for the prosecution, local Crown Counsel expect that that decision will be appealed all the way to the Supreme Court of Canada and they want a ruling at that

full of books, magazines and videotapes which they deem to be obscene. The distributors of these materials are still in operation.
Alderman May Brown, Vancouver

The Committee received many different estimates regarding the size of the pornography industry in Canada and North America. The Canadian Coalition Against Media Pornography, Ottawa, estimated that in North America the income grossed by pornography "ranges from $12 billion a year to $50 billion a year, not including videos. In Canada, estimated earnings from pornography controlled by organized crime is $500 million a year." David Scott, of Toronto, told the Committee that after discussions with law enforcement personnel he formed the view that these sales figures are significantly inflated by the money from other criminal activities being "laundered" through the pornography industry: profits from drugs, racketeering, and loan sharking. He estimated that conceivably two thirds of the income is laundered money.

In each city in which public hearings were held, the Committee was provided with samples of pornography and descriptions of the nature and availability of pornography in that community. In Montréal, Monica Matte observed that the line between soft and hard core material is disappearing. She presented an exhibit of pornography available from one downtown store. It featured incest of all kinds, explicit sexual representations of pregnant women, bondage, racial pornography, child pornography and child prostitution. Excerpts from some of the descriptions of pornography follow.

> ... [the] images present in the mass media have become ever more pornographic over the last decade. Society has increasingly allowed these images to become an acceptable and normal component of entertainment. The juxtaposition of "sex" and overtly aggressive behaviour, from beatings to rape, is commonly found on prime-time television. Each time a new frontier of violence and sexual exploitation is crossed by mass culture, traditional pornographic images become more violent and explicit.
>
> ... [in soft-core pornography] the images of women ... are exclusively vulnerable and available. Women are often referred to as "girls" or by even more denigrating terms, and they exist solely for the sexual gratification of male masters. Soft-core pornographic magazines such as *Playboy* and *Penthouse* depict women on their backs or in crawling positions, often with their buttocks or vaginas displayed for male approval. The positions signal total submission.
> *B.C. Teachers Federation, Vancouver*
>
> Examination of soft-core magazines shows that there is much more incest, pedophilia, and violence and humiliation of women than there was ten years ago. [We see as pornographic] material which is produced with the intention of or effect of sexually stimulating the consumer *by the portrayal of a power relationship* .... The mere fact that material has the effect of sexually stimulating the consumer does not make it pornographic.
> *Toronto Area Caucus of Women and the Law, Toronto*
>
> Pornography is yet another way to silence women. Most women ignore pornography; it is marketed by men for men. The instinctive reaction of many women to pornography is revulsion. The increasing violence, abuse and degradation of women in pornography reveals it to be not about sex or love, but about power of men over women. A common thread running through it is that women are animals, slavishly devoted to carnally pleasing their masters, who are fully dressed, rational and in control of them and the situation.
> *Young Women's Christian Association, Winnipeg*
>
> [We] feel in danger of being swamped with a flood of pornography - magazines, movies and now videotapes, almost all made outside Canada. Our very culture is being undermined and our way of life threatened.
> *Canadian Federation of University Women, Toronto*

3. The Effect of Pornography

The effect of pornography on women, children and society was described in considerable detail in many briefs. The concern of most participants was threefold: that pornography degrades women, robs them of their dignity as individual human beings and equal partners within a relationship and treats them as objects or possessions to be used by men; that male violence against women is treated as socially acceptable and viewers are desensitized to the suffering of others; and thirdly, that these two influences will have a strong negative influence on children and on the family.

> All pornography degrades women. The spectrum of soft to hard core is often alluded to, with the implicit or explicit connection that hard core pornography is dangerous, while soft core pornography is not, or at least, not so dangerous. We dispute this. All pornography is dangerous to women, because it robs us of our dignity, the right to be treated with respect as complete beings, and it squanders our needs as men and women to engage with others as equals.
> *Manitoba Advisory Council on the Status of Women, Winnipeg*
>
> The dignity of women is undermined, dehumanized, and [they] are seen by men as objects, possessions to be used as they see fit, which contributes to the problem of battered women. Even the most mild form of pornography is harmful. The values which support family love, mutual respect, and generosity are undermined, and lust, exploitation, selfishness are promoted.
>
> The growing presence of pornography harms society [because] it:
>
> 1) increases violence;
>
> 2) damages family relationships;
>
> 3) influences young people to engage in pre-marital sex;
>
> 4) children are harmed and exploited.
> *Concerned Morality League, Winnipeg*
>
> Nous considérons en effet que *toute pornographie*, qu'elle soit douce ou "dure" et même dans les cas où elle ne recourt pas explicitement à la violence *est violente* lorsqu'elle suggère que les femmes ont pour unique fonction d'exciter sexuellement les hommes, qu'elle les ravale à l'état d'objets destinés à être manipulés, exploités, dégradés, qu'elle les réduit à leurs seuls organes sexuels, qu'elle refuse aux femmes tout statut d'égalité et d'humaine autonomie. Cette perception de la femme est incompatible avec la dignité humaine. La pornographie alimente des attitudes et des comportements foncièrement sexistes, discriminatoires à l'égard des femmes alors même que notre société prétend promouvoir l'égalité des femmes. Il y a certes une grave incohérence à se préoccuper des problèmes du viol et des femmes battues

alors que l'on permet que des femmes soient agressées et violentées à l'écran, sur photos, dans les livres ou de toute autre façon.
La Fédération des Femmes du Québec, Montréal

Pornography is unacceptable not because it portrays explicit sex but because it promotes hatred, violence, degradation and dehumanization. Pornography is sexist material that portrays women as a distinct sub-human species that does not feel pain or humiliation in the same way as men, and which desire violence and degradation for sexual pleasure. Pornography advocates, encourages and condones coercion, sexual violence and battering and portrays these activities as normal behaviour. As an expression of sexist ideology, pornography promotes a climate in which acts of sexual hostility directed against women are not only tolerated but ideologically encouraged.

Women are ... terrorized by the message that male violence and power is so prevalent and menacing. Pornography alienates women and men. In no way does it foster healthy sexual or human relations any more than other forms of hate literature would foster healthy relations between races or religions.
Ontario Advisory Council on the Status of Women, Toronto

... exposure to pornography leads to an increase in violent sexual crimes and aggressive anti-social behaviour. The person exposed to pornography is being conditioned to think that not only is violence socially acceptable, but that it is sexually stimulating and that the person who is unwilling to be the recipient of the violent act will enjoy it if forced to submit ... Pornography suggests that a woman's value lies in her physical appearance and her ability to sexually satisfy a man. All other capabilities are trivialized ... Pornography undermines values that are important to our society because it dehumanizes the participants, desensitizes the viewers to the suffering of others, and distorts mutual, caring expression into a base act committed by a powerful figure upon a powerless object.
Provincial Advisory Council on the Status of Women, St. John's

Pornographic material ... makes us inclined to accept violence, to downgrade and even deny the dignity of other people, and to unleash our tendencies to dominate others ....
Canadian Conference of Catholic Bishops

Pornography negates sexuality as an expression of love and a form of intimate communication between equal human beings. It focuses merely on parts of the body ... (and) ignores mind and spirit, and turns human beings into objects.
United Church of Canada, Toronto

[Pornography] distorts wholesome and God-given sexual relationships (and) exploits them for profit, so that persons who, in God's purpose, are capable of and deserving of fulfilling personal relationships are deceived into accepting debased fantasies in place of love and commitment.
Anglican Diocese of Toronto

Pornography desensitizes people to each other and destroys the foundations of love, of family, and of human relationships.
Salvation Army, Toronto

One of the most interesting perspectives on the effect of pornography on children, its effect on young boys, was presented by one of the few men's organizations to appear at the public hearings, Le Groupe d'hommes contre la pornographie et l'exploitation sexuelle (Men Against Pornography), Québec City.

Il est malheureux de constater que la sexualité des hommes gravite beaucoup autour de la pornographie ... Tout cela n'est pas surprenant, car c'est souvent à partir de la pornographie que les hommes apprennent à donner forme à leurs désirs, y puisent leurs "techniques" et leurs croyances par rapport à leur sexualité. Cet apprentissage commence très tôt dans la vie. Pour la plupart des hommes de notre génération, c'est dès le début de l'adolescence que nous avons commencé à consommer de la pornographie. C'est surtout là que nous avons tiré nos critères de performance sexuelle, de virilité et ce que nous croyons savoir sur la sexualité féminine. Il en va de même de la génération des 15-20 ans: une enquête menée par un professeur de sexualité du CEGEP Lévis-Lauzon auprès d'étudiants de 19 ans a montré que 98.5% d'entre eux avaient déjà "consommé" de la pornographie, et ceci en moyenne dès l'âge de 13-14 ans. Un sommet semblait atteint vers 17 ans, pour diminuer ensuite. Mais l'apprentissage était fait. Dans un atelier que nous avons récemment animé, un des hommes présents a avoué qu'il avait commencé à regarder les revues pornographiques de son frère à l'âge de 8 ans. Même avant l'éveil de sa sexualité adulte, il avait déjà la tête pleine d'images pornographiques qui allaient orienter ses désirs dès leurs premières manifestations à son adolescence.
Le Groupe d'hommes contre la pornographie et l'exploitation sexuelle, Québec City

While most of the briefs focused on the social harms that are caused by pornography, one economist described the effects which pornography has on women's position in the economy.

... it is not pornography, existing independently, that threatens women's acceptance into and contribution to our economic infrastructure, but pornography as a particularly invidious form of sexism that has thus far defied our legislators in their attempts to protect women from sexual discrimination. Only an intrinsically sexist society could so wholeheartedly support (financially and legally) the sheer volume of pornographic materials available ... it is pornography, the most visible and virulent symptom/form of sexism that may continue to segregate women's abilities from the economic mainstream long after legislation protecting equal pay for work of equal value, or prohibiting sexual harassment, or even encouraging affirmative action is in place and is being practised ... [Pornography is] as much to blame for the slow integration of women into our economic framework as any other manifestation of sexist attitudes.
Carl Beigie, economist, Toronto

4. Definitions of Pornography

The nature of pornography and how it should be defined created a great deal of discussion during the public hearings. The discussion raised two important questions: first, the difference between pornography and erotica, and secondly, the question of where, in the continuum of sexist portrayals of women in the news media, the portrayal of women becomes actually pornographic. While many definitions were proposed, the three most often quoted definitions were those developed by Helen Longino, an American feminist and writer, by Jillian Ridington, a Vancouver researcher, and by Andrea Dworkin and Catharine MacKinnon, of Minneapolis. All of these definitions are discussed in the previous chapter.

Helen Longino's definition, which was quoted in many briefs, is as follows:

> Pornography is verbal or pictorial material which represents or describes sexual behaviour that is degrading and abusive to one or more of the participants *in such a way as to endorse the degradation.* (Emphasis in original)

The distinction between pornography and erotica created differences of opinion between groups with a feminist perspective and those on the conservative end of the spectrum. According to many groups, the distinction is crucial.

> [Erotica] represents images in which the participants are not degraded or abused and are presented as participating equally and freely. Erotica celebrates the positive, healthy experiences of mutual sexual enjoyment between adults.
> *Manitoba Action Committee on the Status of Women, Winnipeg*

> Erotica is for sexuality, since its message implies a mutually pleasurable expression between people; pornography is about commercialized sex, dominance, conquest, and violence against women. Erotica suggests a more balanced power relationship and respect for the body; pornography forces a distorting commercial relationship between the conqueror and victim, and hence is degrading to both male and female.
> *Deborah Seed, Montréal*

The conservative position on erotica was that it should be included in the definition of pornography and prohibited or controlled.

> ... consensual sex, as portrayed in the media, can be destructive of Canadian societal values ... Depictions of explicit, consensual sex would lead to an expectation that any woman will consent, leading further to coercion in real man-woman relationships. Even depictions of loving, indeed marital, sexual intimacy in full, explicit detail ... ultimately dehumanizes sexuality itself ....
> *Roman Catholic Archdiocese of Toronto, Toronto*

> ... there is a direct relationship between habitual exposure to standard sexual material referred to as "erotica" and an increased desire for more bizarre material .... If the people in the representation ... seem to be "consenting adults" rather than people involved in "degrading" or "demeaning" activity, the material could still be pornographic .... Pornography should be defined so as to include ... explicit sexual acts.
> *REAL Women of Canada, Toronto*

4.1 Pornography as Part of a Continuum

The view that pornography was only the extreme end of a continuum of sexist portrayals of women was held by many of the organizations which presented briefs to the Committee. As one participant put it, "pornography is the heartbeat of a sexist society." It reflects and reinforces the sex-role stereotyping and existing inequalities of the larger society, reflecting the power relationships of males and females, as well as those in adult-child relationships and inter-racial relationships.

> Media Watch considers that sex role stereotyping of women creates an environment that encourages the dehumanization, misrepresentation and degradation of women. The extreme form of this attitude is pornography. Presently our environment is polluted with messages that tell us women are powerless, feebleminded, submissive, victims, and only valuable if they are young, beautiful and white ....
>
> Male dominance and female submissiveness are at the very heart of the stereotype of men and women. Pornography is the extreme portrayal of dominance-submissiveness, the objectification and the abuse of women. Media Watch views sex role stereotyping and pornography as a continuum which must be uprooted from our culture.
> *Media Watch, Calgary*

> Pornography has an important function in society's oppression of women. It is the propaganda, the prop, supplying men with examples of society's model of masculinity. Pornography helps to ensure women's sexual, social, political and economic repression. It cannot be a coincidence that pornography exists in a society where women are raped, beaten by husbands, pushed into low income work and generally not taken seriously.
>
> It is a painful act of self-recognition of Christians, especially male Christians, that the Church has transmitted and shaped male domination in western culture. It is beyond doubt that the Church is part of the problem. But with God's grace, we may find courage to become part of the solution.
> *United Church of Canada, Toronto*

5. The Link Between Pornography and Violence

One of the most controversial aspects of the public hearings was the conflict that arose over the link between pornography and violence against women. Those advocating the strengthening of government controls over pornography were convinced that psychological and sociological research had definitely established that such a link existed. Civil liberties groups and others who opposed controls were just as firmly convinced that no such link had been established. The Committee's conclusions on this issue are discussed elsewhere in the Report. This section will simply provide a sample of the views presented at the public hearings, with no comment as to their validity.

The Metro Toronto Task Force on Public Violence Against Women and Children provided a brief summary of the highlights of the research that has been done on pornography and violence.

1. Research in communications and psychology shows that the portrayal of violence in the media contributes to subsequent anti-social behaviour by its viewers. Scientists no longer question this effect; rather they now investigate to what degree anti-social behaviour is elicited, from whom, and under what conditions.

2. Research in experimental settings shows that the portrayal of sexual violence leads to subsequent violence against women. Under certain conditions of arousal, viewing sexual violence causes male subjects to be even more violent toward women than when they view non-sexual violence.

3. Research evidence is growing that so-called 'non-violent' or 'soft' pornography also causes males to behave aggressively toward women, although less intensely than the portrayal of violence alone or the portrayal of sexual violence.

4. While social science shows unequivocally that exposure to violent pornography is a *contributor* to sexual aggression and violence, the rules of scientific evidence make it difficult, if not impossible, to prove that it is the direct *cause* of such behaviour.

> However, as prominent scientists have noted, neither has the Surgeon General (in the United States) unequivocally proven that cigarette smoking is a direct cause of cancer in human beings. Both, however, have accumulated compelling evidence of causal links.
>
> These findings, and many related findings described in the literature, indicate ample justification for our society to quickly take steps toward the elimination of violent and aggressive pornography.
> *Metro Toronto Task Force on Public Violence Against Women and Children, Toronto*

Many groups provided the Committee with anecdotal evidence of the connection between pornography and violence in their own communities. The Ontario Advisory Council on the Status of Women included a compendium of anecdotal and circumstantial evidence linking pornography to actual crimes committed in North America. Le Regroupement Féministe Contre la Pornographie, in Montréal, described their work with battered women and reported that they are increasingly encountering women who have been forced to re-enact scenes from pornography consumed by their partners. The Canadian Federation of University Women in Toronto cited several Canadian murder cases in which there was said to be a connection between the murderer's actions and his use of pornography. A social worker, a member of La Fédération des Femmes du Québec, conseil Régional Saguenay, told the Committee that she frequently meets situations where women are required by their spouses to engage in unusual practices, to join in group sex and exchange partners, to engage in the sexual practices their spouses have seen on pornographic films in local bars, and to pose nude.

The Toronto Area Caucus of Women and the Law, like many other groups, cited studies by Professors Malamuth and Donnerstein to support their view that pornography encourages male violence against women by linking men's sexual arousal to violence and conditioning them to perceive violence as an essential component of sexual excitement; by showing violence against women as acceptable; by depicting women as enjoying violence against themselves.

Many took the view that while research linking pornography and violence is in its beginning stages, they personally do not want to wait for confirming evidence of the negative long-term effects of violent pornography. They believe that the probability of a strong link between violent pornographic videos and an increase in sexual offences must be taken seriously until proven false by statistical evidence.

They point out that pornography, like advertising, is a message with the aim of influencing behaviour. Since studies have already established that sexist advertising reinforces sexual stereotypes, pornography must have some influence on male behaviour.

> I compare pornography to racist films or literature: the medium does not cause misogyny in the case of pornography, nor racism in the case of racist material, but can serve to confirm these values, lend them legitimacy and encourage behaviour based on those values. From this confirmation, this legitimization, stems the harm.
> *Mayor Marion Dewar, Ottawa*

> Current scientific study (Malamuth and Check) has proven that in the laboratory setting there is no question that the sexual violence depicted in aggressive, violent pornography leads to aggression toward women. Specifically, there is considerable evidence showing that exposure to aggressive pornography dealing with rape produces a lessened sensitivity to rape, an increased acceptance of rape myths and *interpersonal* violence against women, as well as self-reported possibility of raping.
> *Canadian Coalition Against Media Pornography, Ottawa*

6. Municipal By-Laws and the Display of Pornography

Many groups described their efforts to persuade their municipalities to introduce or enforce by-laws to control the access of children to pornography. Major difficulties arose because of the vagueness of the federal legislation regarding obscenity and the enabling provincial legislation in some provinces, as well as the reluctance of local governments to act.

The recommendations made by most groups, including civil liberties associations, was that the display and sale of sexually explicit materials should be restricted to adults. Some suggested that all such magazines should be displayed behind opaque barriers at a height of 1.5 meters above the floor and that such publications should be sold in sealed plastic packages.

7. Film Classification and Censorship

Most groups favoured the continued provincial classification or censorship of all movies to be shown in public, although there was some criticism of particular provincial boards. There was also strong support for the proposal that provincial censor boards expand their duties to include the censorship of videotapes destined for private viewing.

> [This group] favours the establishment of a classification and labelling process of all video recordings, including a process of pre-screening by a permanent board and forfeiture of all material deemed illegal ....
> *People and Organizations in North Toronto, Toronto*

> [We] recommend that censor boards be given more adequate staff to cover the enormous volume of material being imported; have their mandates expanded to cover video cassettes, be they shown in public, rented or sold for private use; and similarly, be made responsible for the review of all television transmissions.
> *Roman Catholic Archdiocese of Toronto, Toronto*

> [NAC] cautiously advocates limited and clearly defined censorship and recognizes the need and difference between prior and post restraint measures.

The attendant problems of the former can best be avoided by issuing clear and explicit guidelines and by the selection of Censor Board members who have a comprehensive awareness of the problems of violence against women ... Prior restraint [should] be used to eliminate only the most blatantly pornographic material and ... post restraint or the use of the Criminal Code provisions [should] be used to deal with material that either escapes the prior restraint process or which clearly exceeds the guidelines.
National Action Committee on the Status of Women, Toronto

The Manitoba government is now examining a host of reforms, including classification of videos for home use and regulating the use of satellite pornography in hotels and beverage rooms. However, without the suggested federal reforms, these initiatives cannot go ahead.
Manitoba Action Committee on the Status of Women, Winnipeg

8. Canada Customs

The inability of Canada Customs to prevent the importation of a great deal of the most violent pornography into Canada was strongly criticized in many briefs. Excerpts from the Ontario Advisory Council on the Status of Women brief summarized the major concerns.

1) Customs officials follow the same procedures as other law enforcement officials in focusing on sexual explicitness rather than violence or degradation. As a result, the more harmful types of pornography are allowed over the border.

2) Customs practices are not the same across Canada. The Joint Forces Project "P" in Toronto has found that British Columbia and Québec allow materials to cross their borders which would be prohibited in other provinces. The Attorneys General in the provinces set their own obscenity guidelines and standards and Customs officials tend to follow those guidelines. Once over the border the material can be freely transported across Canada.

3) The heavy volume of traffic at border crossings creates a situation in which only a comparatively small number of vehicles can be searched.

6) The federal guidelines for determining what is immoral or indecent are vague and decisions made by Customs officials are often subjective.

8) Legitimate movie houses are given 60 days to decide whether they can afford to make the cuts necessary to allow importation. During the 60 days that the film is in Canada thousands of copies can easily be made. The movie house may then take the *original* film back to Customs stating that it could not afford to make the cuts. The original film is then banned by Customs, but copies are not covered and would have to be found and seized.

The recommendations made by most groups focused on the need to: strengthen and standardize the Customs procedures; to train Customs officers and provide them with guidelines; and to eliminate the 60-day period apparently allowed in some Customs areas to importers of commercial films so that they can have the film reviewed and classified by provincial authorities.

9. Recommendations for Change

In summing up their recommendations for change, many witnesses emphasized that it was not only the actual laws that need to be changed, but the administration of the laws. Many believed that the proliferation of pornography is not unrelated to the fact that our society, including its entire justice system, is controlled by men.

As it stands now, men make virtually every decision about what is and what is not obscene: at the source, in the conceptualization of sex roles by male producers of pornography; at the newsstand, the bookstore and box office, in the acceptance or rejection of pornographic materials for sale or purchase by predominantly male retailers and customers. Obscenity laws are written, argued and passed by legislatures comprised almost entirely of men ... The same laws are enforced at the borders by Customs inspectors who are almost invariably male, and in the community by police departments staffed overwhelmingly with men. Breaches of obscenity laws are prosecuted by male lawyers in courts presided over by a male judiciary. So called "expert" testimony is supplied, almost without exception, by male witnesses ....

Furthermore, day-to-day coverage of the obscenity issue is directed by male publishers, editors, editorial writers and reporters, with the inevitable result that male sensibilities predominate, usually to the virtual exclusion of any comment at all by women.
Judith Dobie, Montréal

The specific recommendations for change made by the majority of women's groups are similar in intent to those proposed by the National Action Committee on the Status of Women whose proposals are outlined below.

1) The present provision regarding 'obscenity' (Section 159, of the *Criminal Code*) should be repealed.

2) (a) A new offence, prohibiting the manufacture and distribution of pornographic material should be incorporated into the *Criminal Code*. This provision should not be located in the "Offences Tending to Corrupt Morals" section of the *Code*, but should either be in a new, independent section or be included in the section dealing with "Offences Against the Person" or under "Hate Propaganda".

Pornography should be defined as:

any printed, visual, audio, or otherwise represented presentation, or part thereof, which seeks to sexually stimulate the viewer or consumer by the depiction of violence, including, but not limited to, the depiction of submission, coercion, lack of consent, or debasement of any human being.

For the purpose of this definition, the depiction of any person who is under the age of 16 or who is depicted as being under the age of 16 will be sufficient to deem the material pornographic.

(b) Wherever appropriate, the words "obscene" and "obscenity" should be deleted and replaced by the words "pornographic" and "pornography".

3) The *Customs Act* should be amended by removing the current prohibition against "material of an indecent or immoral nature" and replacing it with a prohibition against pornography, as defined in 2(a) above.

4) The *Broadcasting Act* should be amended to prohibit the broadcast of sexually abusive material, and such restrictions should apply to pay television.

5) The "Hate Propaganda" section of the *Criminal Code* should be amended to include sex as an "identifiable group". This section should be further amended by removing the necessity of the consent of the Attorney General before proceeding with an offence. [Some groups also suggested that the word "wilfully" should be deleted from Section 281.2(2)].

Suggestions made by other groups included:

1) The Solicitor General should instruct the RCMP and crown attorneys to keep records of the use of pornography in sex-related crimes, such as sexual assault, wife battering, incest and sexual murder.

2) Women should be given the civil right to sue producers of pornography for damages, as proposed in the Minneapolis by-law in the United States.

3) The guidelines on sex-role stereotyping, which were prepared for the Canadian Radio-Television and Telecommunications Commission, should be given the status of regulations and that licences for radio, television and pay television should be contingent upon adherence to these guidelines.

10. Organizations Opposed to Controls on Pornography

The opposition to controls, or to increased controls, on pornography, was made up of three distinct groups: first, civil liberties groups, some professional associations, and film and video organizations; second, periodical and video distributors and retailers; and third, gay rights organizations. Because their reasons for opposing controls were so different, each group will be treated separately.

10.1 Civil Liberties and Professional Associations

The right to freedom of expression and opposition to censorship were raised in briefs from the Canadian Association of University Teachers, from civil liberties associations and from film and video organizations.

> A great deal of literature from the ancient Greeks onward has as themes violence, horror and degradation. One only has to think of Oedipus Rex or of Titus Andronicus or indeed of many of Shakespeare's contemporaries ... or of any novelists or dramatists who have used war as a basic theme. Not only would the definition (as proposed in Bill C-21) place these works in jeopardy, it would also have a chilling effect on booksellers and publishers in Canada who may ... refuse to print, to sell or to distribute such books in order to avoid harassment.
> *Canadian Association of University Teachers, Ottawa*

The Canadian Civil Liberties Association pointed out in its brief that while it "has no hesitation in joining the National Action Committee on the Status of Women in an unequivocal denunciation of the 'new pornography'" it found it necessary to distinguish between moral condemnation and legal prohibition.

> The former is easy; the latter is fraught with difficulty ... How is the law to formulate a standard which will prohibit this vile pornography without simultaneously catching in the same net a lot of other material which it would be unconscionable to suppress?
> *Canadian Civil Liberties Association, Ottawa*

The Civil Liberties Association points out that in several obscenity cases tried under present provisions of the *Criminal Code*, neither trial judges, appeal court judges nor Supreme Court judges were able to agree on whether books such as *Lady Chatterly's Lover* and *Fanny Hill* were obscene. The vagueness and subjectivity of the present law, the Association said, leaves publishers, film makers, authors and booksellers in a state of constant insecurity as to whether they are in compliance with obscenity laws. They conclude that while "one flawed definition does not invalidate the concept of legal prohibition ... there is reason to fear that dangerous imprecision is inherent in the very exercise of attempting to define pornography."

The Association concedes that the definition of pornography proposed by the National Action Committee on the Status of Women "creates fewer dangers than the one proposed by the government [because] it attempts to narrow the subject matter to the issue of coercive sex." However they conclude, after examining the danger posed by pornography, that:

> ... the evidence fails to demonstrate a direct causal link between exposure to pornography and the serious abuse of women and children. We are aware, of course, of the reports that on a number of occasions, those who have violated women and children were found with pornography in their possession. What is not known, however, is whether the pornography produced the violence or whether those violence-prone people were attracted to pornography. Moreover, there has been no adequate measure of the number of people, otherwise violence-prone, whose aggressive impulses may have been moderated by sublimation through pornography.

The Civil Liberties Association concludes that:

> ... the present obscenity sections of the Criminal Code should be repealed. Moreover, it is crucial that they not be replaced by anything broader. The ... recommendations of NAC ... represent welcome steps in the right direction. But ... even they are likely to incur excessive risks.

The Association is firm in its opposition to censorship of any material involving *simulated* sexual abuse, but concedes that in the case of pornography which involves the actual abuse of real people "there is an arguable case for legal prohibition against the resulting film or literature."

Civil liberties associations in several cities gave their qualified support to municipal regulations designed to keep pornography out of the sight and reach of children.

The B.C. Civil Liberties Association explained the rationale behind their acceptance of regulation.

> Regulating a forum is not inconsistent with the maintenance of its freedom. We have an obvious and legitimate interest in protecting the young from forms of expression that we regard as possibly harmful to them. We also have an interest in protecting citizens from effrontery when we can provide that protection without materially limiting access to media on the part of persons who wish to see or hear them. Our association approves of those regulations which impose formal constraints upon those who distribute and sell pornographic materials to do so with that measure of discretion which provides for these two legitimate social interests. It is appropriate, for instance, for the Director of Film Classification to provide movie patrons with advice concerning the presence of possibly disturbing material. Similarly, we do not object to requiring magazine merchants to withhold from public view those of their wares of which the covers could disturb children or affront innocent adults.
> *B.C. Civil Liberties Association, Vancouver*

The Canadian Association also agrees that pay TV stations should comply with certain standards regarding the material they are to carry.

> Where facilities are at a premium, there is a strong argument for some kind of regulations over the mix of things which can be shown, whether it is sexual, religious, nationalistic, or athletic. ... the articulation of the standards is a contentious exercise ... [but it] is not as contentious in the context of granting special licences as it is in the context of restricting general freedoms.

Another organization which expressed strong opposition to censorship of any kind was the Ontario Film and Video Appreciation Society (OFAVAS) which has been involved for two years in court actions against the Ontario Board of Censors (now the Ontario Film Review Board). Their allegation that the Board contravenes the *Charter of Rights and Freedoms* was upheld by the Ontario Court of Appeal with the result that the Ontario government was forced to bring in specific legislation setting out the powers of the Censor Board.

OFAVAS, a group of filmmakers, writers, journalists, artists, performers and others, outlined their reasons for opposing censorship.

> As people involved for the most part in creative fields, we use words and images as the tools of our work. Our creative use of these tools permits us to develop insight for ourselves and others into the nature of the world around us. We fear that if we cannot broach certain subjects or use particular images or words or ideas, that our effectiveness in giving expression to the complex range of human experience will be severely curtailed. We find it short-sighted and untenable that a government-appointed board is permitted to interpret the meaning of images and ideas on behalf of everyone else in this society. It is gross interference in our work, and something that we feel is intolerable in a democratic society.
> *Ontario Film and Video Appreciation Society, Toronto*

The Society also pointed out that as a group which supports feminist goals, they believe that social change is essential in order to improve the lot of women. However, they believe that censorship of pornography is an ineffective solution to the problems of discrimination against women.

> We are aware of the negative image of women that pornography presents. We share the revulsion of many over commercial exploitation of people in pornographic material. However, we do not believe that pornography is the root cause of sexism in society: to the best of anyone's knowledge, a subordinate station in life has been the lot of women in most societies throughout history. We see censorship as a placebo measure that does nothing about the real problems that discrimination causes, and which, in fact, distracts from giving those problems the attention they deserve and require. Furthermore, the very real danger exists that censorship, perhaps even inadvertently, will serve to silence the very voices that could raise awareness toward social change.
> *Ontario Film and Video Appreciation Society*

The Society then goes on to explain why it disagrees with the feminist view regarding violent pornography.

> The feminist perspective that has gained wide acceptance and momentum has shifted emphasis away from graphic sexuality to questions of violence and power. This approach, however, implicates a whole range of imagery, from news, sportscasts and documentaries to narrative films like Westerns and horror movies. From our standpoint, it makes more sense to challenge overtly sexist behaviour and the discrimination and hatred behind that behaviour. But if we look for images that show women in a way that could be seen as sexist, it becomes very difficult to define the pornographic. Everything from fashion magazines to the paintings of the old masters could conceivably be seen to be in this category. Our fear, of course, is that if it is so difficult to define pornography, it is inevitable that attempts to define it in law for the purpose of censoring it will affect other areas such as social comment and artistic expression.

OFAVAS agrees that sexism and violence cannot be tolerated, and explains why censorship is not the answer.

> But simply curtailing representations of these acts will not stop them from happening. It may even prevent people from discussing and understanding them. Censorship, by simply eliminating "objectionable" images, undermines public challenge and debate over the values which motivated their production. It attacks the symptoms, not the root cause. It is sex discrimination and hatred in the real world that hurts people and that must be stopped.

The solutions recommended by the Society include: a classification system which could be used to inform the public of the nature of material that might be harmful to minors or offensive to some adults; height and placement restrictions for magazines displayed in stores; and adult-only bookstores, if necessary.

It also makes recommendations designed to correct the present sexual inequality in the broadcast and film industry.

> We urge the Committee to recommend and support all affirmative action programs with respect to the training and hiring of women in both the broadcast and film industries. We recommend that the Committee stress to these industries the basic inequality present in a system of production which is dominated by a single gender of our population.
>
> We support the recommendations of the *Report of the Task Force on Sex-Role Stereotyping in the Broadcast Media*, ("Images of Women," CRTC, 1982), which calls for specific programming and media created and administered by women.
> *Ontario Film and Video Appreciation Society, Toronto*

10.2 Periodical and Video Distributors and Retailers

The views of distributors and retailers of periodicals and videotapes were presented to the Committee by the Periodical Distributors of Canada, Ottawa, and the Video Retailers Association of Canada Inc., Toronto, as well as a few individual retailers.

The Periodical Distributors, founded in 1942, said that it represented 37 Canadian-owned or controlled companies which distribute approximately 85 per cent of the magazines and paper back books sold in 12,000 local newsstands throughout Canada. They estimated that their sales are approximately $200 million annually.

In their brief, the distributors outlined their views on what Canadians would consider pornographic and denied any involvement in distributing such material.

> ... most Canadians would describe as pornographic, such hard-core material as that depicting, in an objectionable and most offensive manner, extremes of sexual behaviour, especially within the context of violence and forced submission of women.
>
> While PDC members cannot assume responsibility for everything which may be offered for sale at retail outlets, we can assure the Special Committee that we do not knowingly handle material which is obscene or, by any reasonable standard, pornographic. PDC members have exercised particular concern over the possible presence in the mass market of material which may be exploitative of sex and violence in combination. We believe that "violent pornography" is extremely rare on Canadian newsstands, and that what may exist, is not there as a result of having been distributed by PDC members.
> *Periodical Distributors of Canada, Ottawa*

The Video Retailers Association pointed out that the great majority of their retailers are business people anxious to maintain their reputation within their community. They agreed that the undue exploitation of violence, cruelty and sex should not be acceptable, but that their problem is in trying to define what is "undue." They stated that no one, not the police, the retailers' lawyers, the provincial boards of film censors or Canada Customs will provide guidance on what they can legally distribute.

They urged that standards should be established that would: be tolerable to the public; be clear and helpful to business and to law enforcement; be acceptable to private consumers; and be constitutionally workable.

Gay Rights Groups

10.3 Gay Rights Organizations

Several gay rights organizations presented briefs which emphasized that gay pornography is quite different from heterosexual pornography.

> Heterosexual pornography is often said to victimize women as a gender group, women depicted as submissive and passive receptacles of violence by male producers for male consumers. The same cannot be said of homosexual male pornography, however, in which gay male producers, models, and consumers all come from the same gender group and cultural community.
>
> The heterosexual male consumer, by virtue of his gender and place within patriarchal power relations, is automatically constrained to look at a woman in a sexual representation in terms of "otherness" and imposed objectification. In contrast, the homosexual male consumer, looking at gay sexual depictions, is offered a range of identification choices determined not by his gender but by his individual cultural and erotic predispositions. The argument that women as a group are victimized by heterosexual pornography has no equivalent argument with relation to gay pornography: in this sense, gay pornography is primarily a "victimless cultural phenomenon."
> *Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

The Gay Cultural Workers provided an analysis of the difficulties faced by gays as a minority group in a predominantly heterosexual society.

> Culture is the texture of people's lives, the way a community communicates with itself and the outside world. The state should encourage and protect community cultures not suppress them. State suppression cannot erase a culture, only change its form, drive it underground or distort its language.
>
> As a minority characterized by its sexual orientation and sexual practices, the gay community has always had a flourishing tradition of erotic culture. Whether or not this has been underground or above-ground, written or oral, professional, ... or amateur, has depended on historical factors such as the tolerance of the state, the vigour of police persecution, and the degree of organization or concentration of the gay community.
>
> All gay culture, not only gay erotica, is stigmatized by the heterosexist mainstream as pornography and obscenity. Obscenity statutes have traditionally been an important means by which the state, the Church, and the police attempt to destroy our culture, in the Canadian context as in many others. Since the so-called decriminalization of sodomy by the 1969 Omnibus Bill, and since the emergence of above-ground gay communities in every Canadian city about the same time, this campaign against gay culture by means of obscenity statutes has not disappeared. On the contrary, it has ballooned, ...
>
> For centuries gay culture remained invisible, covert or underground ....
>
> Since the mid sixties our culture has emerged above ground. There exists across Canada a flourishing fabric of gay culture, all including an important erotic component: literature, bookstores, cinema, visual and performing arts, journalism and media ....

> Over the last fifteen years, the mass-produced erotic magazines have not been the only targets of the police (through enforcement of obscenity statutes, and through extra-legal harassment and prior censorship, Customs officials exercising censorship through highly subjective and undefined criteria), and other censorship bodies both official and unofficial. In fact, the more frequent targets of such attacks have been "legitimate" cultural manifestations, within all the categories listed above. The obscenity statutes permit not only the prosecution of our cultural products, including non-erotic print journalism, but create an atmosphere in which the equally dangerous unofficial and regulatory (non-criminal) censorship is encouraged, whether by provincial theatre boards, marauding morality squads, biased Customs officials, crusading private citizens, or puritanical television networks.
> *Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

The major difficulty with the present obscenity sections of the *Criminal Code*, as far as the gay community is concerned, is the fact that the decision as to what is obscene is made by a judge, based upon "national community standards", and on the assumption that the judge knows what these standards are.

There are four problems with this:

1) Canada is made up of many diverse ethnic and cultural groups. A set national community does not exist.

2) Judges in Canada are appointed. They are not elected from a community to represent that community.

3) Though a gay community definitely exists, it is not limited to one geographic area. It is dispersed throughout a large country in which many community standards exist.

4) No judges are known to be openly gay.

> To have a judge rule over what is degrading and horrifying to a community of which he or she probably has very little understanding and insight is to leave that community very vulnerable .... The existing obscenity laws, ... have been used against the gay community. The proposed changes to the law [Bill C-19 of 1983] make it all the more dysfunctional and thus a much more powerful tool for abuse.
> *Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

The Gay Cultural Workers point out that if community standards are to continue to be the final test of what is obscene, the gay community should be allowed to define the standards for its own community.

> It must be remembered that commercial explicit depiction of homosexual practices are aimed at gays. For the most part, prurient heterosexuals will only see these materials if they make a conscious effort to seek them. For the majority, no matter how large, to decide what materials a minority sees and hears, especially when that material has not been proven to be harmful in any way to the majority, goes against the democratic tradition.
> *Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

The Committee was also urged to explore the idea of extending the hate literature sections of the *Criminal Code* to protect sexual minorities as well as visible minorities and women.

> Many elements within the gay community would welcome legal redress against the frequently vicious homophobic components of mainstream culture and the media (for example the film *Cruising* which many of us felt to be advocating violence against us in an explicit and degrading way) or against more obvious forms of hate literature such as the anti-gay pamphlet campaign that affected the 1980 Toronto municipal elections through lies and smears.
> *Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

Most gay groups called for the repeal of present obscenity legislation, some arguing against censorship of any kind, and others suggesting that a new section of the *Criminal Code* should be developed to deal specifically with pornography on the basis of sexual violence and not on the basis of sexual explicitness.

11. Conclusion

The public hearings were an important aspect of the work of the Special Committee. The well-researched briefs, presented by groups and individuals in every region of Canada and representing a wide diversity of opinion, were an invaluable contribution to the body of information collected by the Committee. We thank all of the participants who devoted many hours of their time for their help in the attempt to find acceptable solutions to the problems involved in pornography in Canada.

committee failed to address gay concerns

Chapter 6

Pornography in Canada Today

1. Introduction

As will be apparent from the preceding chapter, virtually everyone who appeared before the Committee or made a representation to it, had very strong views about pornography. While the majority of those making presentations found pornography to be too widely available, especially with respect to children, and the content of pornography to be abhorrent and despicable, there was a strong minority opinion stating that as awful as some of the pornography is, any moves by the state to ban or control access to the material would have worse consequences than the material itself being easily available.

The issues which were raised at the public hearings can be divided into three general areas: the increased availability of pornographic material; following from this, the implied increase in the number of people who are exposed, willingly or unwillingly, to such material; and thirdly, the harms to individuals and society as a consequence of the first two factors.

Those making representations to the Committee used a variety of sources of information to substantiate their arguments. Some groups had conducted their own surveys in their communities to see what sorts of materials were available and where; others reported on crimes or unacceptable forms of behaviour which appeared to be connected to the use of pornography. In addition, many people made reference to studies conducted by academic researchers which, they argued, supported the views and conclusions they had reached.

In this chapter we will analyze in some detail the evidence bearing on the three issues described above. The question of evidence is an important one. Canadians who wish to see more stringent controls on pornographic material, support this course of action because of the harms they see deriving from the widespread availability of pornography. Groups who are, in general, philosophically opposed to control and censorship, also indicated that controls would be acceptable to them if indeed significant harms were shown to result from use of such materials. Support for certain lines of action are, therefore, contingent on the strength of the arguments about increased availability, increased use and resulting harms.

In order to assist the Committee in its efforts to understand the current situation with respect to the availability and use of pornography in Canada today, the Department of Justice commissioned a number of studies on pornography. The studies fall into four general categories: 1) comparative studies, 2) specific issues within Canada, 3) a National Population Study, and 4) a review of the recent research.

The comparative studies involved an analysis of legislation and control practices in the United States, the United Kingdom, selected European and Commonwealth countries and other jurisdictions thought to be of interest.[1] The research was generally undertaken in conjunction with work on prostitution laws. Information was taken from published sources, interviews with selected officials, if possible, and reports on public attitudes towards the issues.

Within Canada, four empirical studies were commissioned on specific issues: provincial film censor boards,[2] the production of pornography in Canada,[3] a content analysis of triple x and adult videos[4] and an analysis of how selected newspapers covered pornography as an issue.[5]

In addition to these studies, a major element in the research was a National Population Study conducted in June and July, 1984.[6] A sample of 2,018 Canadians, representative of all parts of the country except the Yukon and Northwest Territories, answered questions about the availability of pornography in their communities, their use of such material and their preferences about whether or how the material should be controlled. Although it is difficult to study such complex issues as obscenity and its control in the relatively short time given to survey interviews, the results present some interesting information on Canadian views. As the first such large-scale project in Canada, however, the survey was something of a learning experience for all concerned. Because of this, not all the issues included in the survey were as well addressed as one would wish. The results should, therefore, be seen as one contribution to an understanding of these issues, and not a definitive statement on the topic.

The final project in the Department of Justice's research program was a review of the research literature from 1975 onwards.[7] The review examines the impact of pornography as presented by researchers in sociology, psychology, social psychology, criminology or related fields. Over 450 citations were examined and reported on. This review is very comprehensive and proved invaluable in assisting the Committee to gain an overview of all of the more current research in the area.

Although the Department of Justice's research has provided the Committee with most of its empirical information on pornography, the Committee itself was involved in the gathering of information other than through the public hearings. This information was typically collected through meetings and interviews with officials in various government departments and agencies, for example, Customs and Excise, the Royal Canadian Mounted Police, the Canadian Radio-Television and Telecommunications Commission (C.R.T.C.), the Post Office, Department of Communications, and provincial film censorship or classification boards. Information from these sources has supplemented and complemented that gained through other means, and has been of significant help to the Committee.

The task of assimilating all the information presented to the Committee has not been an easy one. In the following discussion, however, we present what we believe to be the current situation in Canada with respect to pornography, its availability, use and harms.

2. The Availability of Pornographic Materials

When we consider pornographic material in Canada, we are dealing almost exclusively with material that is imported into the country, rather than material which is produced here. From the information we have it appears that a very small number of pornographic films are produced within Canada but that the production of other forms of pornography, for example, magazines and books is not undertaken for commercial purposes. The only obvious exception to this would be live shows in theatres and bars. Pornographic material coming into the country comes overwhelmingly from the United States. This is the case whether the material is magazines, films or videos. The only other identifiable source of material is European countries, but their contribution to the total volume is very much less than that of the United States. Importation of material and the role of the Customs and Excise and the R.C.M.P. in this regard is discussed in Section II of this Part.

Most people at the public hearings felt there to be an overwhelming pervasiveness of pornography in our society. We made our own attempts to discover what we could about the availability of pornography, rather than relying on these impressions, however forceful they may have been. We will document the basis of the Committee's conclusions on this issue, and in doing so, indicate the areas where our information is not nearly so clear or substantial as one would wish. While we conclude that there can be no doubt that in virtually all parts of the country, pornographic materials are indeed more widely available in 1985 than they were 15 years ago, this conclusion depends not on concise and comprehensive statistics, but on the piecing together of some statistics with indications, trends and general observations.

Research documenting the increased availability of pornography has become a matter of interest only recently. Indeed, until the completion of the research undertaken by the Committee on Sexual Offences against Children and Youths (Badgley Committee)[8] and the Department of Justice in support of our Committee, very little was known about the availability of pornography beyond the personal and anecdotal accounts of people concerned with the issue. The Report on Obscenity and Film Censorship (the Williams Report)[9] from the United Kingdom, points to a similar difficulty in documenting actual increases in the availability of pornographic materials, as do several studies from the United States.[10] It must be remembered, however, that some of the

work in the United Kingdom and the United States was completed before the introduction of pay television or the sudden explosion in the home ownership of video cassette recorders (VCRs).

Anecdotal accounts are, of course, an important source of information. They are, by no means, to be dismissed because they do not meet the current canons of social science research. Frequently, however, more information is required in order to be sure that one is not dealing with a highly aberrant situation. Nevertheless, it would be difficult to argue against the logic of the position that says that if some television stations are advertising adult entertainment and blue movies, and if films are now available on videotapes as well as in the theatres, pornography has indeed become increasingly available.

As indicated by the research conducted for the Badgley Committee, part of this increased accessibility occurs because more stores, and a wider range of stores, carry pornographic magazines and publications than previously.[11] Until relatively recently, pornographic materials were confined to a few stores in any city which were "known" to specialize in such materials. Now, a full range of the material is available in virtually any store which sells magazines. These include the thousands of corner or convenience stores used by people, including children, on a regular and frequent basis. Pornography is also more accessible in that it is not confined now to printed matter and films which can been seen only in theatres. Instead pornography is on television, particularly pay television, with the potential of being seen in virtually every home across the country. Where pay television is not accessible, the films can be seen on videotapes. Satellite transmission of signals is also starting to play a role in the distribution or pornography.

We know also that the print media and adult magazines are readily accessible not only to adults, but also to children, in every region. In the majority of instances, stores which sell adult magazines make no effort to segregate them from any other type of material. Although pornographic magazines are available throughout the country, there are some regional variations. Thus, the western provinces appear to have more of such material than do the eastern ones, with the exception of Québec. Québec is most like British Columbia in terms of the pornography available in its stores, leading to the conclusion that these two provinces are the most permissive with respect to sexually explicit material.

The information reported by the Badgley Committee is confirmed by the information from the National Population Study, in that 73% of the respondents were aware that adult magazines, movies and videos were available in their communities. Close to three-quarters of those participating in the survey concluded that pornography is easily available to anyone who wishes to see it.[12]

With respect to magazines, therefore, we are on firm ground in asserting that such magazines are more accessible than before, and that there has been a substantial increase in their sales over the past 16 years or so. The Badgley Committee has the most comprehensive and extensive research to date on the availability and circulation of pornographic magazines in Canada.[13] They report that the circulation figures for 17 different magazines for the period 1965-1981 are 3.5 times higher per capita in 1981 than they were in 1965. In 1981 each Canadian bought 0.556 magazines, compared to 0.183 in 1965, with males, in particular, increasing their consumption from 0.364 magazines in 1965 to 1.121 in 1981.

It is undoubtedly the case that the increased availability of pornography, particularly of magazines, is related in part to an increase in the production of such magazines and their importation into Canada. By the 1980s the number of different titles had risen to 540, representing a sharp increase over the past 20 years. While it should be noted that many of these magazines publish only one issue so that the great increase in titles cannot necessarily be equated to an equally overwhelming increase in materials, the general conclusion has to be that more pornographic magazines are now being published than previously.

All the evidence which the Committee has considered leads to the conclusion we stated above that pornography is far more available today than it was 10 or 15 years ago. This availability results from the use of all forms of media, from an increased production in some forms, if not all, and from a distribution network that has increased significantly in size to take in a far wider variety of outlets than previously. Pornography is certainly part of the content of every form of the media and is easily available in every part of the country.

3. The Use of Pornography

The question of whether more people are actually using pornography is not, however, so easily answered. We lack consumer information from previous years, and are not able to make the necessary comparisons between the numbers of people who bought or saw pornography then and those who do so now. Circulation figures for magazines have clearly increased but this does not necessarily mean that more people are buying the magazines. Instead, it could mean that the same number of people who bought magazines in 1965, for instance, are now buying more because there is a greater variety of material available. Accordingly we must ask whether the increased availability of magazines results in a broader dissemination or in a greater concentration in use of the materials.

The information we have does not allow us to give an unequivocal answer to that question. Both trends seem to be occurring but we cannot be precise about the extent of either. The significance of the inquiry about consumption lies in people's theories about why pornography is harmful. The concerns we heard most often at the public hearings were that, for adults, exposure to or use of pornography beyond a certain point was harmful to the individual, groups in society and society as a whole. Implicit in the argument is that the amount of material which a person sees is a relevant consideration in determining whether

harm takes place. It is thought unlikely that an adult looking at one pornographic magazine or video would be harmed irretrievably, whereas, an adult, seeing this material to the virtual exclusion of all other forms of entertainment will develop a corrupted view of human relations. Somewhere between these two extremes, it is assumed that the average Canadian is likely to be harmed when the quantity of material used crosses the threshold between not being harmful and being harmful. The amount of material used is, therefore, crucial to the debate over whether a person is harmed by the material and may then go on to harm others.

There is also a view that a large number of people will be adversely affected by pornography that is pervasive. This argument focuses not on the heavy use of pornography by a few, but rather on use, beyond an acceptable level, by a large number of people. The effects of this pervasiveness theory are twofold. On the one hand, it is argued that the users themselves will be harmed because they acquire from pornography a distorted view. On the other hand, it is argued that harm will be suffered by the group that is portrayed in the material. Generalization of these portrayals throughout society will cause others to think of all members of the group in the way they think of those portrayed.

These different theories about the harms of pornography give rise to different suggestions about how best to deal with it. Thus, the Committee has had to contend with these different theories, as well with the related problem of what it is that people are actually seeing.

From the National Population Survey we know that 11% of Canadians over 18 years old (somewhat over two million individuals), bought at least one "adult entertainment magazine" in the preceding 12 months, i.e., sometime between June/July 1983 and June/July 1984. Men outnumber women buyers by a ratio of 3:1. A further 32%, or nearly 6 million individuals, did not buy a magazine but did leaf through or read one at least once during the previous year, with men again being far more likely to do so than women.

Apart from revealing that the consumer is likely to be male, the survey data indicated that the consumer has a number of characteristics which differentiate him from the non-consumer, although it is difficult to interpret why certain attributes might lead a person to buy magazines of this kind. All we can say at this stage is that those with less than eight years of education buy fewer magazines than those with more education; the unemployed are over-represented among those who buy the magazines; there is a tendency for young people to outnumber older buyers, for the single to outnumber the married and for consumers to come from Ontario and the West rather than Québec and the Atlantic region.[14] Clearly we need considerably more research before we can be confident in talking about the buyers of such magazines. Such research must address questions like why people buy these magazines, whether they buy only one or several, for how many years they buy them, and a whole host of similar questions relating to consumer motivation and behaviour.

The usage statistics of adult-only videotapes are virtually identical with those relating to the use of adult entertainment magazines, according to the National Population Study. Twelve percent of Canadians had bought or rented such videotapes in the previous year.

Although magazines and videos are often cited as the media which people use if they are seeking pornography, in fact most Canadians see on television what the National Population Study termed "adult entertainment". Of the respondents to that survey, 57 percent said they had seen television programs showing nude adults at least once during the previous 12 months, 43% had seen programs containing scenes of heterosexual intercourse, 57% sex combined with violence and 67% sexual activity between people of the same sex.

While these data indicate the wide use of adult entertainment, caution is necessary in their interpretation. As will have been evident from the way in which the results have been presented, the survey dealt with what was termed "adult entertainment" and not pornography. Adult entertainment is probably a broader term than pornography in the minds of most people, and as we have outlined in a previous chapter, pornography itself has many connotations in everyday usage. The terminology used in the National Population Study, then, means that we cannot conclude from the survey anything about the use of the sort of pornography featuring images of perversion or degradation, in comparison with other categories of adult material. Indeed, it may well be the case that some of the material within the category of "adult entertainment", while being inappropriate for children, could actually be considered erotica because it does not demean the nature of sexuality.

The only indication we have of the sort of material the respondents had in mind when answering the questions is in relation to magazines. As is confirmed from circulation figures, *Penthouse* and *Playboy* are the magazines bought most often, by 39% and 30% respectively of the respondents, followed by *Playgirl* (8%) *Hustler (6%)*, then a whole variety of other magazines (7%). *Playboy* is read or leafed though by 38% of respondents, *Penthouse* by 23%, *Hustler* by 7%, *Playgirl* by 6%, and other magazines by 7%. These figures illustrate the overwhelming significance of *Penthouse* and *Playboy*. Whether or not one considers their content acceptable they are certainly the ones that most people see.

Although we can gain some indication of the total number of people who have been exposed to adult entertainment from the National Population Study and magazine circulation figures, we still do not have much information about actual patterns of consumption. We do not know, for example, the extent to which the same individuals buy the different magazines, producing a high concentration of usage rather than a widely dispersed but less intense exposure. For instance, the Badgley Report confirms that *Penthouse* and *Playboy* are the best selling magazines in Canada with monthly sales of 500,000 and 300,000 respectively. But we do not know whether 800,000 different Canadians each buy a copy of these magazines, or whether 300,000 of the half million people

who buy *Penthouse* also buy *Playboy*, or the exact extent of the overlap between buyers of one pornographic magazine and the buyers of another.

Nor are we very informed about the frequency with which individuals buy pornography. The survey figures indicate the numbers who have bought at least one magazine in the past 12 months but do not inform us of the numbers who buy such material every week or every month. Similarly, circulation figures such as those included in the Badgley Report tell us how many magazines are being bought in a month but not whether the same or different people buy them each month.

If one looks for information on the overlap between magazine users and users of other forms of the media, the only data available are from the National Population Study. While the figures reflect the influence of television, there is some overlap in the use of the different media. It is also noticeable that while nearly a third of the respondents use or see no adult entertainment material at all, two thirds do use or see such material. (See Table 1)[15]

Table 1
Use of Adult Entertainment Magazines, Videos, and/or Television

Material Used	Percentage
None	31.5
Magazines only	6.8
Videos only	1.2
Television only	30.6
Videos & Magazines	1.4
Videos & Television	3.0
Magazines & Television	16.7
Videos, Magazines & Television	5.7
No Answer	3.1
TOTAL	100.0

The wide dissemination and viewing of sexually explicit material thus appears to be a well-established fact. Because of the terminology used in the National Population Study, we do not know whether all of this material would be pornographic in the way we have described that term in chapter 1 of this Section. Certainly we have received complaints during the public hearings about the content of *Playboy* and *Penthouse*. Similarly, we cannot answer whether the viewing of such material has reached a level which could be considered detrimental to either the general population or specific groups of individuals. The answers to these questions rest in part on our understanding of how pornography affects people, a topic which will be discussed later in this chapter. Before doing so, however, we must give further consideration to the content of the material being seen.

4. The Content of Pornography

The question most closely tied to the issue of who is consuming pornographic material is the question of exactly what it is they are seeing. That is, what is the actual content of the depictions or texts? This issue is of central concern in any debate about the value or harm to be attached to pornography. Again, however, the research literature is disappointing.[16]

Generally, studies have been confined to a limited number or type of magazines, and to short time periods in terms of comparison. As with other research on pornography, what is termed pornography can vary considerably from one study to another. It is also significant to note that given the importance of television as a source of adult entertainment, studies of the content of television programs available in Canada, and in particular, longitudinal studies which could document any change in content, are rare.

The research which has been conducted on magazines and videos does not confirm the overwhelmingly awful picture presented by some groups and individuals in their briefs to the Committee. We recognize, of course, that for some people, any film or magazine with a theme of sexual violence is one too many. But the view that large amounts of violent pornography or child pornography are being consumed is not substantiated by the research. Again, one can well argue that the pornography which is available does indeed portray women as degraded, sexual objects and that this is as harmful as portrayals of sexual violence. But, the idea that a great deal of the pornography has taken on the worst possible characteristics of the genre is unconfirmed at this time.

The Badgley Report, in a content analysis of the texts and pictorials of 11 popular adult magazines which were published in June, 1983,[17] stated that most of the depictions are of totally or partially unclothed women in positions which expose their genitalia. Violent images and themes were found in 1.3% of the pictorials and 4.1% of the texts. Children were not depicted in the pictorials but were part of the texts (4%) and of the advertisements (10%). Clearly, violent and child pornography is present but is not an overwhelming theme in these magazines.

It should, perhaps, be no surprise that the content of pornographic magazines changes as does the content of other media. What is difficult to know, however, is what pornography is changing from and to what. Again, we have to conclude that at this time we simply do not know.

The study which is most widely cited in support of the view that there is increasing violence in pornography is that conducted by Malamuth and Spinner.[18] These researchers analyzed the pictorials and cartoons of *Playboy* and *Penthouse* from June 1973 to December 1977. They found that violent images had increased, but that they did not in any event exceed 10% of all

cartoons and 5% of photographs and drawings. The change in content that Malamuth and Spinner reported is both minimal and marginal and could be accounted for by many other variables than simply an escalation in the violent content of the magazines. Again, the research does not lead us to any firm conclusions on the trends in the material.

Consider, also for example, some of the changes in content which may not be related to questions of violence. A 1982 study by Dietz[19] of 1,760 heterosexual pornographic magazine cover photographs stated that in 1970, lone women were the subjects of the majority of cover pictures whereas by 1981, this was the case for only 10.7%. Apart from the 1981 covers which could be said to display normal heterosexual relations between one woman and one man (57.9%), 17.2% portrayed scenes of bondage and domination (perhaps evidence of increased violence although sado-masochism is not necessarily exploitative), 9.8% group scenes and 4.4% transvestism or transsexualism.

What such changes in content indicate is difficult to interpret. The disappearance of lone women from pornographic magazine covers might be a positive development if it is interpreted as an indication that women are coming to be seen not just as sexual objects to be observed. There is some sense of context in that other people are included. On the other hand, the increased representation of the more extreme forms of sexual behaviour is not reassuring. Similarly, the notion that pornographic comics portray women as having the same sexual desires as men, could be regarded as positive by some who see it as an egalitarian approach.[20] Others, however, would argue that this denies the real nature of women's sexuality, particularly where depictions of male sexuality stress impersonality or aggression.

The one other area where we have some information with respect to content is video-cassettes. A study conducted for the Department of Justice in the lower mainland of British Columbia analyzed 150 videos, 58 rated as adult, restricted or x rated by the stores from which they were rented and 92 triple x rated.[21] This area of British Columbia has achieved a reputation as a major source of pornographic material and as an area where the more extreme varieties of sexually explicit material are available. It was believed, therefore, that in studying videos available in the lower mainland, some of the most extreme material available in Canada would be analyzed.

It was assumed that the "adult" videos would be less explicit and extreme in terms of their depiction of sexual and violent activities than the triple x videos. Having completed their analysis of the videos, however, the researchers conclude that the basis of the distinction between adult and triple x videos is not particularly clear. The 150 videos contained 4,203 separate scenes. An analysis of the scenes resulted in 50% (2,101) being excluded from further consideration because they did not include any sex, aggression and/or sexual aggression. Of the 2,102 scenes which did contain these elements, the following distribution was found:

Table 2

Classification of Video Scenes by Content

	% of scenes coded	% of all scenes
Sex	77.4	38.7
Aggression	18.7	9.4
Sexual Aggression	12.7	6.3
Other	—	50.0
N	(2,102)	(2,101)

(Note: the scenes total more than 100% because some scenes contained more than one element.)

While adult videos could be considered less extreme in that they contained fewer scenes involving sex, aggression or sexual aggression than did triple x videos, there was a clear increase over time in the depiction of sex scenes in the adult category. The triple x videos contained more sex scenes than the adult videos, although the number of these scenes decreased over time. The triple x videos also contained sex scenes that were considerably more positive than the scenes in the adult videos. That is, the participants were there by mutual consent and appeared to be enjoying the activity. This latter finding was contrary to the expectation that the triple x videos would contain the most dehumanized depictions of human behaviour.

Distinctions between the two types of videos are consequently difficult to make. While both types of videos do contain scenes of sexual aggression, violence and domination are not predominant themes. Rather, mechanical sexual relations, i.e. an absence of affection, love or passion and a concentration on the pure mechanics of sex between two adults of the opposite sex were by far the most common portrayals. None of the films involved children and only one percent and two percent of the adult and triple x films respectively involved those who were apparently teenagers. Further, the adult videos contained more scenes of aggression and particularly physical aggression than the triple x.

The incompleteness of the available research makes it difficult to reach any conclusions about the content of pornographic material. Certainly, there are depictions which the vast majority of Canadians would find completely unacceptable. These depictions appear, however, to be in a minority. About the majority of the depictions, there would be much more debate. The trends in the content of pornographic material are also hard to detect and equally difficult to interpret. The material is changing, but whether for the better or the worse is, as we have remarked, a matter of judgment.

5. Pornography and Harms

The concerns about the increased availability of pornography, its use by a wider range of people and the nature of current pornographic material, come together at the point of discussing the impact or harms that may be associated

The debate about the harmful consequences of pornography is perhaps one of the most contentious and difficult debates of our time.[22] People hold very strong views about the harm that pornography causes. They argue that pornography is to be deplored simply for portraying people in an inhuman way or because it invites consumers of pornography to imitate the inhuman behaviour portrayed. In the latter instance, it is argued, non-consumers of pornography, especially women and children, are often victims of the consumers who want to act out the fantasies they see in pornographic material. Further, the argument runs, we are all victimized to the extent that a society which condones the portrayal of people in such degrading and inhuman ways is a society whose values are, at the very least, questionable. The exploitation of one group of people for the gratification and entertainment of another and for the gratification of the more extreme sexual desires of men is surely not consistent with the type or quality of society we would like to see and develop.

Against these arguments, it is maintained that pornography has not been demonstrably and systematically linked to individual, group or social harms. Until such a linkage is demonstrated and supported by reasonable evidence, the dangers of invoking strict control of the material or of censorship, outweigh the potential, but unproven, harmful impacts of pornographic material. It is suggested that those who consume pornography are, like consumers of other mass media, only too well aware of the fantasy involved in pornography. Thus pornography does not cause or encourage people to act in inhuman ways. Indeed, the argument is also made that the material has a cathartic effect, allowing individuals to vent their anger and hostility vicariously. To the extent that such is the case, then pornography is not only harmless but actually beneficial to individuals and society.

It has also been suggested that the prevalent fascination with pornography is a reflection of our unease with ourselves as sexual beings. The past 20 years has seen the culmination of significant change in the sexual mores of large numbers of people within Canadian society. This has by no means been an easy transition or one with which everyone agrees, and the debate over the causes and consequences of pornography in many ways typifies the fundamental disagreements and disputes over sexual behaviour and values.

For some, pornography is merely an aberration associated with an opening up of a formerly repressed and little understood area of our lives. This line of reasoning suggests that pornography will disappear as we move to a more complete and thorough understanding of our sexuality. In its place we will see an increase in erotic literature, the portrayal of sexual activities which are mutually pleasurable and represent the exercise of real choice by each of the partners. In the meantime, the dangers associated with attempting to censor the content of the mass media are greater than the supposed harms that result from the availability of pornography.

For others, the pornography which is available today is so abhorrent and harmful that immediate action is needed to prevent or curtail access to it. Governments are called upon to pass legislation which would allow for the effective control of what is seen to be extremely offensive and harmful material.

Our concern has been to determine whether or not all the available evidence would lead us to support one of these views rather than the other in the debate about the impacts of pornography. Although certain aspects of the issue are more amenable to empirical study than others, we recognize that academic researchers have been for some time now addressing the question of the impacts of pornography, and in particular, the harms which might be associated with its availability and use.

We have noticed, however, in the course of the public hearings, two distinct schools of thought about what research data must show in order to justify legislative action on pornography.

Those who see freedom of speech as the highest value argue that the data must demonstrate that concrete harm to individuals is caused by pornography, in order to support controls on it. They reject the idea that controls can be justified by a showing of some generalized harm, or by showing (or arguing) that pornography impairs the realization of other social values. Thus, they reject the contention of the conservatives that controls can be justified because pornography fosters disintegration of the moral values of society, the place of the family, and the sanctity of marital sexual relations. They also reject the contention of feminists that controls on pornography can be justified because pornography impedes the realization of equality for women and diminishes their humanity.

The advocates of free speech as the highest social value thus take a distinct position on what research should demonstrate. They also are firm about how they think the harm should be demonstrated. Their expectations are that before legislative action can be justified, there must be a clear or definite showing of the link between pornography and measurable harm to individuals. When measured against these two standards, the existing research, not surprisingly, falls short. There has been considerable research on the pornography harms issue, but most of it has occurred in the last 15 years, inspired at least in part by the publication of the U.S. Commission on Obscenity and Pornography[23] and the tremendous controversy it generated. As we elaborate below, this research has, as yet, given us few firm conclusions about what actual harms can be attributed to pornography. Clearly, to satisfy those who adhere to what we have previously described as the liberal philosophical view, the research must become more systematic and co-ordinated.

Let us now consider a quite different point of departure for regarding the work of pornography researchers. The basis for this other view is not the guarantee of freedom of expression which is now embodied in section 2(b) of the *Charter of Rights*. Rather it is the guarantee of equality which is found in sections 15 and 28. In particular, the point is made that these two provisions

guarantee to women equality with men, including the right to the equal protection and the equal benefit of the law.

Proponents of this view argue that pornography undermines this guarantee, by portraying women as less than human, demeaned, and subordinate. They cite the impairment of the guarantee of equality as itself a harm done by pornography, reasoning that a society which accepts and fosters the portrayal of women in this fashion cannot in fact be committed to the realization of their equality. The more the pornographic message is tolerated, by, for example, refusals to penalize its most odious expressions or to control its dissemination, the longer will our efforts to realize equality be delayed.

Those who choose the equality guarantee as their point of departure approach the question of what the data should show to justify legislative intervention in quite a different way than do those who reason from the freedom of speech premise. They point out that those who seek to assert the freedom to voice virulent anti-egalitarian sentiments or purvey such images should be called upon to show that the messages do not harm the equality principle. They say that the data on pornography to date have demonstrated no beneficial effects of pornography: given that it cannot be shown to be useful, and does convey a demeaning message that inhibits equality, it is deserving of very little constitutional protection. These arguments entail the clear suggestion that the level of constitutional protection afforded to messages that are *prima facie* anti-egalitarian, would increase to the extent that such material could be shown to have a countervailing beneficial purpose.

The proponents of this equality approach are, of course, more tolerant of the existing shortcomings of empirical research about the actual harms to individuals of pornographic material. They point out that the momentum of such research is in the direction of being able to show harms, and that by contrast there is no research documenting the beneficial effects of pornography. Therefore, on balance, there has been some empirical showing which supports the argument in principle.

The differences between these two approaches to the data are quite striking. The egalitarian approach does not require that the whole burden of justifying legislation should fall upon the research data; the libertarian approach does. Moreover, the libertarian approach imposes, in effect, a very high burden of proof before the data will be taken, in the words of section 1 of the *Charter of Rights*, demonstrably to justify incursions on freedom of expression. By contrast, the egalitarian approach regards the issue of harm (and consequently justification for restraint) as resolved at least in part by the theoretical argument, coupled with empirical observation about the nature and impression of pornographic messages. Thus, its expectations about the amount and nature of empirical evidence supporting controls on pornography are not as stringent as those of the libertarians.

It is quite evident, however, that the bulk of the research on pornography has been conducted in order to address the question of harms associated with

exposure to por… that pornography does not impede women's … s far as we could determine, non-existent. In … d we are, therefore, opening up a new area … ime, we must consider the research which … nd what it says about the impacts of porno…

Although the Committee was frequently told that research studies clearly demonstrate that harms to society and to individuals were associated with the availability and use of pornography, we have had to conclude, very reluctantly, that the available research is of very limited use in addressing these questions. We want to articulate our position very clearly: the Committee is not prepared to state, *solely on the basis of the evidence and research it has seen*, that pornography is a significant causal factor in the commission of some forms of violent crime, in the sexual abuse of children, or the disintegration of communities and society. Pornography may, indeed, be a prime factor in each of the undesirable consequences mentioned but, *based solely on the evidence we have considered*, we cannot at this time conclude that such is the case.

This conclusion appears to run counter to what a great many people argued in their briefs to the Committee. Yet it seems to follow from a careful analysis of the research. We consider, however, that it is extremely important to note that this conclusion is drawn, not because the research positively demonstrates the lack of linkages between pornography and anti-social behaviour, or that pornography causes positive outcomes, but because the research is so inadequate and chaotic that no consistent body of information has been established. We know very well that individual studies demonstrate harmful or positive results from the use of pornography. However, overall, the results of the research are contradictory or inconclusive.

There are several reasons why the existing research is so unhelpful in the debate about pornography. Perhaps most fundamentally, the various researchers proceed upon different definitions of pornography. Thus, when one attempts to make comparisons between studies or to draw together the conclusions of several pieces of research, one finds that one is not dealing with a constant phenomenon. Some definitions are so specialized to the experimental situation of which they are part that they have virtually no use in other contexts. Other definitions are so general that they are essentially unusable in everyday situations or when one is attempting to draft legislation which will control those elements which are seen to be undesirable.

Definitions of pornography in the research literature include the portrayal of a whole range of explicit sexual acts, sometimes without any violence involved; sex and violence; violence without sex; and a large number of contextual factors, all of which can affect the definition of the material as pornographic.[24] There is, therefore, no accumulated body of research which deals consistently with the same phenomenon. Rather, we have hundreds of pieces of research each dealing with portrayals of a discrete form of behaviour.

The limitations of the research also arise out of the methodology used in many studies. A great deal of the research relating to pornography has been conducted using the standard experimental designs and techniques of social psychologists. Such studies are typically designed to answer the question "What effect, if any, does the viewing of pornographic material have on the viewer?" The research attempts to provide the answer to questions about the consumption of pornography in general by studying the response of those in the experimental situation, typically male university undergraduates.

All research conducted through such experimental methods confronts two problems. Firstly, can the researchers be sure that the change in the person is indeed caused by the designated stimulus, in this case the viewing of pornography? Secondly, even knowing how the subjects in the experiment reacted, what does this allow us to say about the population in general? There is, we acknowledge, some comfort to be taken from the research methodology. Researchers' confidence about the causes of attitudinal changes increases to the extent that they find people reacting in similar ways as experiments are repeated with new subjects. Similarly, the extrapolation of experimental results to people outside the experiments proceeds with more confidence when the researchers have a good theoretical understanding of why, for instance, people's attitudes may change in the way they do. Once one understands why something is occurring then one is better able to describe what sorts of people may react in a particular way under particular circumstances.

Unfortunately, the research on pornography does not demonstrate a high level of consistency of results between different experimental situations. In addition, attempts to integrate research findings into more systematic explanatory systems are few and far between.

It will also be apparent that the type of research discussed above can address only certain sorts of issues. Thus the research is typically designed to investigate the effects of seeing a considerable amount of pornography in a relatively short time. The effects which are measured are usually changes in attitude that are apparent immediately or a short time after viewing the material. Such research cannot address the effects of consuming pornography over long periods of time, for instance, whether there is a cumulative effect as people read and see pornography over months and years. Nor can it deal adequately with the issue of whether specific attitudes or changes in attitudes are related to subsequent behaviour. Holding a particular attitude may be a prerequisite to acting in a specific way. We know, however, that people do not always act in the way predicted because there are all sorts of other factors which intervene. The relationship between attitudes and behaviour is, after all, not a simple one.

A further issue not readily amenable to research in the laboratory, is that of the impact of pornography on people who may not be considered an "average Canadian adult". Such people may be especially vulnerable to the messages contained in the material. Children fit this category, but it will be obvious that for ethical reasons one cannot expose children to large doses of pornography for experimental purposes, in case it does indeed adversely affect their attitudes and behaviour. A second category is people who may already be predisposed towards violent sexual behaviour who find in pornography the ideas or legitimation for the acts they wish to perpetrate. Again, these people will not be found in laboratory experiments because of ethical considerations and because typically, we have no way of identifying the potentially violent until they are indeed violent. The effects of pornography on such people, therefore, remain unknown and will have to be investigated by means other than laboratory research, something which is yet to be done on any extensive or systematic basis. The small amount of evidence we have available so far is, again, inconclusive.

There are reports that some children who are sexually abused are required to perform in ways depicted in adult pornography. Similarly, some reports from battered women indicate that their husbands use pornography and that they expect their wives to imitate the behaviour portrayed. Research in these areas is relatively new, and it does not seem that the question of whether pornography is a precipitating factor in the illegal or anti-social behaviour has often been included in the research studies.[25] While we might expect that it will be included in the future, the untangling of what may be causal or predisposing factors versus factors which are present but simply coincidental to the behaviour being studied, will be difficult. The same argument can be made with respect to those convicted of sexual crimes. The question of whether pornography is a factor in their crimes has not been fully studied and requires further attention.[26] As with so many other areas within the pornography debate, we have to conclude that we do not know at this time whether pornography is or is not linked to various forms of behaviour.

The discussion about the relationship between pornography and sex crimes has been long, acrimonious and inconclusive.[27] Most of this debate has focused on the correlation between the increased availability of pornography and the increase in sex crimes, rather than an analysis of the behaviour of sex offenders. Correlational research is fraught with difficulties. As we have indicated earlier in the chapter, describing and documenting the increased availability and use of pornography is no easy task. Given the difficulty of dealing with definitions of sex crimes which change over time, and the problems of the under-reporting of crimes, it is evident that documenting the rise and fall in sex crimes is equally problematic. Any undertaking which depends on putting these two very difficult areas together is obviously going to give very speculative results. In view of this, it is not surprising that most discussions of the issue conclude that the evidence for the supposed relationship between the increase in pornography and the increase in sex crimes, is not conclusive.

As suggested earlier, social-psychological research does not address the issue of long-term use of pornography. In particular, the issue of relatively low levels of exposure or use of the material over long periods of time is not amenable to experimental research. And yet, it is possible that this sort of use is characteristic of most people. Leafing through *Penthouse* or *Hustler* at the

barber's, or watching the occasional adult movie on television, may be as much pornography as many Canadians see. Does this sort of use and the fact that we may be aware of the magazines in the corner grocery, lead us to accept and take for granted the themes portrayed in the material and in so doing, cause subtle shifts in our values and views about human relationships? We do not know. Here again there are enormous difficulties in separating out what value, attitudinal or behavioural changes are occurring and then attempting out of all the experiences people have, to determine whether or not pornography is a significant factor. On the one hand, the mass media are enormously influential in our lives. Advertisers, as a group, spend large amounts of money to try to change aspects of our behaviour. Whether all aspects of our behaviour are equally susceptible to change and whether our values, for example, about human dignity or equality, are also likely to shift as a consequence of seeing certain types of material in the media, are issues in need of study. Yet again, our current information is inconclusive.

Perhaps the most central issue of all which requires attention is that of defining what it is that makes material pornographic. While many studies concentrate on the effects or impacts of pornography, few deal with the question of what pornography is. The question needs careful and systematic consideration because if pornography is indeed in the eye of the beholder, as opposed to being definable in relatively precise and clear terms, then the issue of harm to individuals and society becomes increasingly difficult to address.

As we suggested earlier in the chapter, some issues in the pornography debate are not amenable to the sort of empirical research we have so far been discussing. The issue of harm to the values which we believe should be the foundation of Canadian society is a case in point and of particular importance.

While Canadian society is an amalgam of different cultures and traditions, we believe that the philosophical principles we have discussed in the first part of our report have the strong support of Canadians. These values address the fundamental nature of human beings and the sort of society which we consider generations of Canadians have been striving to achieve: sometimes successfully and sometimes not. Our social, economic and legal programs are directed towards our attaining a society in which these fundamental values are not only supported but actually reflected in the lives our citizens are able to lead. Anything, therefore, which is seen to undermine or work against this possibility has to be considered very carefully. Is the matter in question undermining the values we espouse and, if so, what course of action should be undertaken to stop or overcome the trend?

While the question of support for common fundamental values in Canadian society can be pursued through sensitive and well-designed empirical research, there has been no such research to date. In part, therefore, our statement that the values are supported rests on what we ourselves believe to be the guiding principles of Canadian society, demonstrated through official statements and action over the years and inferred from what people told us at the public hearings.

The second part of the argument, whether pornography undermines or inhibits the achievement of these values is the crux of the matter. The answer depends on how one reconciles conflict between fundamental values like equality on the one hand and freedom of speech on the other.

In the view of the Committee, there are magazines, films and videos produced solely for the purpose of entertainment whose depiction of women in particular, but also, in some cases, men and young people, demeans them, perpetuates lies about aspects of their humanity and denies the validity of their aspirations to be treated as full and equal citizens within the community.

We agree with the Justice and Legal Affairs Committee's statement made in 1978:

> This material is exploitive of women - they are portrayed as passive victims who derive limitless pleasure from inflicted pain, and from subjugation to acts of violence, humiliation and degradation. Women are depicted as sexual objects whose only redeeming features are their genital and erotic zones which are prominently displayed in minute detail.[28]

Because of the seriousness of the impacts of this sort of pornography on the fundamental values of Canadians, we are prepared to recommend that the *Criminal Code* has an important role to play in defining what material may be available within our society. Where it is not so clear that the material has the impact described above, we are suggesting instead of criminal prohibition more restricted access than is currently the case. Our proposals and the rationale for them are described in detail in the next chapter.

6. Views About Pornography

Data from the National Population Survey indicate that Canadians have widely differing views of what they would term acceptable or unacceptable material. In part, each view rests on the content of the material but it also depends heavily on who might be watching or seeing the material and the way in which the material is presented. Many Canadians appear relatively conservative in terms of the material they define as unacceptable, in allowing access to the material and in the methods they support for controlling the material. These opinions are not, however, by any means unanimous and just as one finds Canadians who would like a very restrictive regime with regard to sexually explicit materials, so there are other Canadians who contend that individuals should be free to produce, distribute and use such materials, unless others are demonstrably harmed in the process.

The following table gives an overview of the respondents' feelings about the acceptability of certain types of material.

Community standards

Table 3[29]

Level of Acceptability
Towards Sexually Explicit Material

Statement	Extent of Agreement		
	Agree	Neither	Disagree
All sexually explict material for adult entertainment is obscene	31%	23%	42%
Sex magazines are unacceptable in our society	45	18	35
Use of sexually explicit materials by adults is unacceptable	32	20	43
Everyone has the right to view sexually explicit material as long as it is done in private	66	15	16
Everyone has the right to produce sexually explicit materials so long as it does not hurt anyone	32	15	50

Overall, one has to conclude that Canadians are quite evenly divided in their opinions of what is acceptable and unacceptable. There is, however, stronger support for the view that people have a right to *see* sexually explicit material than they have the right to *produce* it. Table 3 gives us only a very broad view of the material which is acceptable or unacceptable. Not surprisingly, the acceptability of material depends on its specific content and the potential audience. Whether the material is available in magazines, on film or on television has little impact on the level of acceptance although there is support for specific action related to each of the media. In terms of content, respondents rated material which contained sex and violence most unacceptable, followed by homosexual intercourse, heterosexual intercourse and one or more nude men. Material containing one or more nude women was rated the most acceptable? While respondents thought viewing by themselves or other adults as reasonably acceptable, they were strongly oppposed to children being allowed to view the material.[30]

A majority of the respondents think that pornography is a problem in Canada (59%), although not as significant a problem as other social and economic issues. Indeed, only 1% of the respondents indicated that pornography is a major problem. Nevertheless, people hold very decided views about the harms associated with the use of pornography. That the viewing of violent sexual material leads people to commit acts of violence is believed by 69% of the respondents, and 48% of respondents believe that people imitate in real life the scenes they see in the violent sexual material. In addition, respondents were of the opinion that sexually explicit magazines are degrading to women (67%) and more degrading to women than men (66%).[31]

As may be expected, respondents' views on the control of pornographic material vary in accordance with their level of acceptance of such material.[32] While most people (59%) thought that the government had to take the lead role in controlling sexually explicit material, this view was held most strongly by those who found the material particularly unacceptable. Conversely, those who are more accepting of the material tend to favour

discretion. There is, however, a strong sentiment, held by two-thirds of the respondents, that the police and censor boards should have more power to deal with sexually explicit material.

Respondents generally favour greater control by authorities when the material is considered to be more extreme, for example, violent sexual scenes. Some 38% of respondents suggest that magazines containing sexual violence should be banned. Thirty-one percent suggest that such films should not be allowed on television at times when children and juveniles are likely to be part of the audience and a further 25% would ban the material altogether from this medium. Similar responses are found in relation to films in movie theatres, with 36% of the respondents suggesting that such movies be banned entirely. Only when works in art galleries are considered do the respondents opt clearly for less restrictive measures and prefer family discretion. The following table summarizes responses to different types of material in the media. While indicating a preference for more control over the material being exercised, it is also apparent that respondents want to limit the access of children to such material and feel that warnings about the nature of the material should be given. Responses to the question of control and access to pornography are shown in Table 4.

Given the diversity of opinion on many aspects of the issue, it is apparent that any recommendations on the control and accessiblity of pornography will be controversial. Although nearly three-quarters of the respondents thought it very important that action be taken to deal with violent sexual material and material to which children might have access, consensus over how exactly to deal with these two issues does not exist at this time.

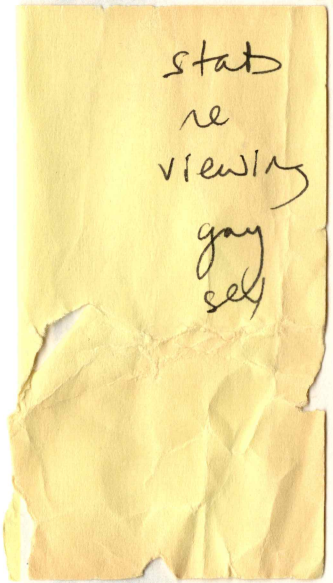
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Table 4[33]
Actions to Deal with Sexually Explicit Scenes in Different Media

Scene and Media	Nothing/ Personal or Family Discretion	Remove Offensive Parts	Forbid Presentation Access/ Selling to Children	Advertise It May Offend	Fine or Jail Producer	Ban Such Material	No Answer
Violent sexual scenes shown in magazines	9%	14%	13%	13%	4%	38%	9%
Sexual intercourse between two adults of the same sex in entertainment magazines	13	9	18	13	4	35	8
Entertainment magazines, which could be sold at a local store or newsstand, which include pictures of nude men	19	7	34	11	3	19	7
Late night entertainment programs showing sexual intercourse between a man and women	31	11	—	27	3	19	9
Entertainment programs on TV which show nude adults at hours when children might be watching	13	9	31	12	2	25	8
Unrestricted entertainment movies which show nude adults	24	12	19	12	2	12	19
Theatres restricted to adults which show sex associated with violence	12	13	11	16	3	36	9
Sexually explicit paintings in an art gallery	49	5	10	17	1	11	7

Footnotes

[1] Jayewardene, Juliani and Talbot, *Prostitution and Pornography in Selected Countries*; W.P.P.P.#4; Kiedrowski, and van Dijk, *Pornography and Prostitution in Denmark, France, West Germany, The Netherlands and Sweden*, W.P.P.P.#1, Sansfaçon, *Agreements and Conventions of the United Nations With Respect to Pornography and Prostitution*, W.P.P.P.#3, Sansfaçon, *Pornography and Prostitution in the United States*, W.P.P.P.#2; Taylor, *The Development of Law and Debate in the United Kingdom in Respect of Pornography and Obscenity*, W.P.P.P.#14.

[2] Boyd, *Sexuality and Violence, Imagery and Reality: Censorship and the Criminal Control of Obscenity*, W.P.P.P.#16.

[3] Kaite, *A Survey of Canadian Distributors of Pornographic Material*, W.P.P.P.#17.

[4] Palys, *A Content Analysis of Sexually Explicit Videos in British Columbia*, W.P.P.P.#15.

[5] El Komos, *Canadian Newspapers Coverage of Pornography and Prostitution*, 1978-83, W.P.P.P.#5.

[6] Peat Marwick and Partners, *National Population Study of Pornography and Prostitution*, W.P.P.P.#6.

[7] McKay and Dolff, *The Impact of Pornography: An Analysis of Research And Summary of Findings*; W.P.P.P.#13.

[8] Badgley Report Vol. II.

[9] Williams Report.

[10] See for instance: B. Heinrich, *Extent of Child Pornography in Texas*, Texas Legislature House Select Committee on Child Pornography, Austen, Texas, 1978, and L. Lederer (Ed.), *Take Back the Night: Women on Pornography*, (New York, Morrow, 1980).

[11] See Badgley Report, Vol. II, Chap.54, at 1243-1268, for a discussion of the availability of pornography.

[12] Peat Marwick & Partners, *op. cit.* at III.23-26.

[13] Badgley Report, Vol. II, Chap. 54.

[14] Peat Marwick & Partners, *op. cit.* at III.15-23 for discussion of use patterns and the material seen.

[15] *Ibid*, Exhibit 38.

[16] McKay and Dolff, *The Impact of Pornography: An Analysis of Research and Summary of Findings*, W.P.P.P.# at 31-36 for a discussion of pornographic materials.

[17] Badgley Report, Vol. II, Chap.53, at 1213-1241.

[18] N. Malamuth and B. Spinner, "A longitudinal content analysis of sexual violence in the best-selling erotic magazines", *Journal of Sex Research*, 16 (1980) at 226-237.

[19] P.E. Dietz, "Pornographic Imagery and Prevalence of Paraphilia", *American Journal of Psychiatry*, 139 (1982) at 1493-1495.

[20] D.E. Palmer, "Pornographic Comics: A Content Analysis," *Journal of Sex Research*, 15 (1979) at 285-298.

[21] Palys, *A Content Analysis of Sexually Explicit Videos in British Columbia*, W.P.P.P.#15.

[22] See for example: T. McCormack, "Feminism, censorship, and sadomasochistic pornography", *Studies in Communications*, 1 (1980) at 37-61; and "Passionate Protests. Feminists and Censorship", *Canadian Forum*, 697 (March 1980); McKay and Dolff, *The Impact of Pornography: An Analysis of Research and Summary of Findings* W.P.P.P.#13 at 8-15.

[23] Commission on Obscenity and Pornography, *The Report of the Commission on Obscenity and Pornography*, U.S. Government Printing Office, Washington, D.C., 1970.

[24] McKay and Dolff, *The Impact of Pornography: An Analysis of Research and Summary of Findings* W.P.P.P.#13 at 15-22 and 83-85.

[25] M. Cini, *Causes of Wife Assault, a Review of the Literature*, Department of Justice, Ottawa, 1984. (Draft report).

[26] See for instance M. Ragault, *Pornography and Violent Sexual Offenders, A Preliminary Research Report*, Department of Justice, Ottawa, 1983. (Unpublished report).

[27] See the discussion in The Williams Report, Chap.6, paras. 22-59.

[28] House of Commons Standing Committee on Justice and Legal Affairs, *Report on Pornography*, (1978) Proceedings No. 18.

[29] Peat Marwick, *op. cit.* Exhibit 27.

[30] *Ibid.*, at III.2 - 8.

[31] *Ibid.*, at III.9 - 15.

[32] *Ibid.*, at III.28 - 39.

[33] *Ibid.*, Exhibit 49.

Section II

Pornography and the Law

Summary

In this part of the Report we review the history of the law on pornography in Canada. In fact, because the term "pornography" has never been mentioned in our *Criminal Code* and it has never been defined in Canadian law, the discussion has to do with how our courts have struggled with what have been called "Canada's obscenity laws".

We first examine how the original common law test of obscenity was imported into our law from England and was subsequently replaced by the present statutory definition of "obscene".

We go on to discuss all the relevant existing sections of the *Criminal Code*. For convenience they are discussed under two headings, *Pornographic Materials* and *Pornographic Performances*. We review the utility of the present legislative scheme and the important interpretations given to many of the sections by our courts.

There have been various proposals for reform in our obscenity laws since the last major statutory revision of the *Code* in this area in 1959. We review the more significant of these proposals.

After a discussion of the implications of the *Charter of Rights and Freedoms* on the question of pornography, we then review the pertinent provisions of other federal legislation: Canada Customs, the Postal Service and Broadcasting and Telecommunications.

Finally, the last three chapters of this Section respectively study how human rights legislation, film classification and censorship, and municipal law affect the issue of pornography.

Chapter 7

The Criminal Code Provisions

1. The Meaning of Obscene

The first general statutory prohibition of obscenity was contained in section 179 of the first *Criminal Code* enacted in 1892.[1] Under this section it was an indictable offence to knowingly and without lawful excuse publicly sell obscene material or expose obscene material for public sale or to public view. The section did not include a definition of the term "obscene" and in order to apply the section the courts were forced to devise their own legal standard.

They did so by adopting the so-called *Hicklin* test devised by Chief Justice Cockburn in 1868 in *R.* v. *Hicklin*.[2] That test asked:

> whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to immoral influences, and into whose hands a publication of this sort may fall.[3]

and so began the difficult exercise of employing judicial interpretation to remedy statutory inadequacy.

Not surprisingly, the *Hicklin* test was subjected to severe criticism, not only from commentators who were interested in the state of the law, but also by judges of succeeding generations who attempted to apply it.

Chief among the criticisms were these:

(a) The test is flawed, firstly, because the phrase, "a tendency to deprave and corrupt" is unclear and secondly, because it is subjective: a judge or jury must infer the "tendency to deprave and corrupt" from the material itself without the aid of expert evidence of the actual impact of the material on those who encounter it;[4]

(b) The test is based on the tendency of the material to corrupt the most vulnerable individuals such as youths or abnormal adults and, therefore, places an unwarranted restriction upon the materials available to normal adults;[5]

(c) The creator's purpose and the literary, artistic or scientific value of the material is irrelevant. Furthermore, material may be found to be obscene on the basis of isolated passages rather than a consideration of the work as a whole.[6]

In spite of these criticisms, the courts were left to struggle with the *Hicklin* test for 67 years without benefit of any more precise statutory definition. It was not until 1959 that the *Criminal Code* was amended to provide a definition of the word "obscene"[7], which by then appeared in several different provisions of the *Code*. The section is now 159(8) of the *Code* and it provides:

> 159(8) For the purposes of this Act any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

It is apparent that this amendment was intended to provide a statutory definition of the word "obscene" wherever that word is used in the *Criminal Code*, at least in the context of "publications".

As we will see when we examine other sections of the *Code*, words such as "immoral", "disgusting", "indecent" and "scurrilous" are also used as constitutive elements of offences in this area, sometimes on their own and sometimes in conjunction with other terms, including "obscene". Experience has shown, however, that it is the concept of obscenity that provides the governing standard.

The new statutory definition of "obscene" presented some new problems for the courts. It was immediately necessary to determine what effect the section had on the *Hicklin* test. Did it replace it or complement it?

It was clear from statements made by the Minister of Justice when the legislation was introduced that the new statutory definition was not intended to replace the common law test. It was said that it was introduced in order to create an alternative test, which the government believed would be more effective in the prosecution of some of the new publications that had started to appear on newsstands. However, as some critics noted at the time, the government's intention to establish what was really to be a dual test of obscenity was certainly not clearly expressed in the new section.[8]

In the first cases heard after the enactment of the new definition, the courts declared that the *Hicklin* test continued to exist alongside the new statutory test.[9] However, this brief period of judicial agreement ended the first time the point was considered by the Supreme Court of Canada, in *R.* v. *Brodie, Dansky and Rubin.*[10]

By a majority of five to four the court held that D.H. Lawrence's novel, *Lady Chatterley's Lover*, was not obscene. Four judges found that the *Hicklin* test should no longer be applied to publications,[11] two judges held that it should continue to apply,[12] two judges expressly refrained from deciding the issue,[13] and one judge expressed no opinion but applied only the new statutory test.[14]

In the aftermath of the *Brodie* case and the failure of a majority of the Supreme Court to decide the status of the *Hicklin* test, it was left to the lower courts to resolve the question as best they could. They chose predominantly to apply only the statutory definition of obscenity.[15]

The confusion surrounding the *Hicklin* test was resolved to some considerable extent by the Supreme Court of Canada in its 1977 decision in *R.* v. *Dechow.*[16] The court had to decide whether the *Hicklin* test or section 159(8) should be applied in deciding whether certain sex aids were obscene. The majority of the court found that section 159(8) was the sole test of obscenity in relation to what the section referred to as a "publication". The majority gave a fairly sweeping definition to the term "publication" and found that the sex devices in question were publications because the accused had made their character "publicly known" and had issued them for public sale.

The minority held that section 159(8) was an exhaustive definition of obscenity where exploitation of sex was concerned, regardless of whether or not a "publication" was involved.

The practical result of the *Dechow* decision is that if a test of obscenity is to be applied other than the definition contained in section 159(8), the charge would have to involve either something falling outside the sweeping definition of "publication", or something that does not involve the exploitation of sex.

It seems clear, therefore, that only a few cases would not be governed exclusively by the statutory test contained in section 159(8).

We come now to consider the substantive meaning of the statutory test. It has been in force for 26 years and has been subjected to intensive and extensive judicial analysis. The courts have done their best to overcome the almost impossible task of giving contemporary meaning to abstract statutory provisions, while at the same time coping with the doctrine that precedent should be observed so that the application of the law will be predictable.

As might be expected, the criteria developed in the early cases to give flesh to the bare words of section 159(8) have been refined over time and some have even been abandoned. There is a host of decided cases and while extensive reference to the evolution of the various criteria is of interest to legal scholars, we shall, for the sake of brevity, attempt to provide as concise a statement as possible of the criteria presently being used.

Since the first treatment of section 159(8) by the Supreme Court of Canada in *R.* v. *Brodie* in 1962, the test of obscenity has been divided into two major elements:

(1) Whether a *dominant characteristic* of the representation amounts to exploitation of sex or of sex and crime, horror, cruelty or violence.

(2) Whether this exploitation is *undue* in the sense that it exceeds the contemporary Canadian community standard of tolerance.

For some time there was great uncertainty over whether the artistic purpose, artistic merit or scientific value of the material formed separate elements in the section 159(8) test, and, if so, how they were to be balanced against the two major elements. However, as will be seen, it seems now to be

Comm Standards

stablished that the factors of purpose, merit and value are to into each of the two major elements and are not to be ighed and balanced against them. This is the case even all see, section 159(3) makes provision for a public good f involves an inquiry into factors such as these.

The first of the major elements has proven to be relatively uncontroversial. The court must determine what are the dominant characteristics of the material. It has been decided that if the material has more than one dominant characteristic it is only necessary for the Crown to prove that the exploitation of sex constitutes one such characteristic. To make such a determination, the material is examined as a whole with each part considered in context. It is also necessary for the court to examine the literary or artistic merit of the material. The courts have held that in determining the merit of the material, it is desirable, but not essential, that there be expert evidence.[17]

Finally, the theme or artist's purpose must be determined and the court must decide whether the sexual episodes play a legitimate role in the development of that theme or purpose. Are the episodes justified by what has been called the "internal necessities" of the theme?[18]

However, this element of the section 159(8) test now appears to be of very little practical importance. In virtually all recent obscenity cases it has been beyond doubt that a dominant characteristic of the material in question is the exploitation of sex and, in fact, the issue has generally been conceded by the accused.[19]

The more contentious element of the section 159(8) test is whether the Crown can prove beyond a reasonable doubt that the exploitation under the section is *undue*. Some observers have said that the term "undue exploitation" is a contradiction in terms and that no exploitation can reasonably be considered to be *due*. In any event, the standard of legal interpretation was first set out by Mr. Justice Judson in delivering the majority judgment in *R.* v. *Brodie*:

> Surely the choice of courses is clear cut. Either the judge instructs himself or the jury that undueness is to be measured by his or their personal opinion and even that must be subject to some influence from contemporary standards - or the instruction must be that the tribunal of fact should consciously attempt to apply these standards. Of the two, I think the second is the better choice.[20]

Therefore, the result is not to be based on a subjective personal opinion but rather on objective standards of the contemporary community. But the concept of contemporary community standards has proved to be very elusive. In what remains to this day probably the leading judgment on the community standards test, Mr. Justice Freedman's dissent in *R.* v. *Dominion News & Gifts (1962) Ltd.*,[21] it was said that such standards:

> are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or puritan taste and habit of mind. Something approaching a general average of community thinking

In that judgment Mr. Justice Freedman also held that the "community" whose standards are involved in this country is the entire Canadian community, not simply the local community where the material has been found or where the prosecution takes place.[23]

Finally, Mr. Justice Freedman held that, in giving effect to section 159(8), the courts had to be sensitive to the fact that community standards were subject to the evolution of ideas and values.[24]

It must be remembered that the standards are of community *tolerance* as distinct from community *preference*. The court must decide whether, by contemporary Canadian community standards, the material is tolerable in the sense that the general average of community thinking would have no objection to the material being read or seen by those members of the community who may wish to read or see it. The question is not whether the material is an affront to personal standards, but whether the standards of the community would tolerate the publication being viewed.[25]

In determining the standards of tolerance, reference is made to several different factors, including artistic or literary merit, the purpose for which the material is being viewed or read and the context in which it is being viewed or read. A higher level of tolerance is assigned to material that possesses artistic or literary merit,[26] or is to be used for scientific or educational purposes.[27] There is also greater tolerance for material that is restricted to adults, or to a particular segment of the community, such as writers or artists, than there is for material that is generally available or publicly displayed.[28]

In assessing the purpose or the value of the material, the work is to be taken as a whole, and it is not appropriate to isolate for analysis only those parts which seem offensive. Some materials, however, especially magazines, may have no single theme and in these cases each page can be looked at more or less in isolation.[29]

If the community standards of tolerance test can be formulated with reasonable precision, it is still notoriously difficult to apply. His Honour Judge Borins of the County Court of Ontario had this to say in *R.* v. *Doug Rankine Co.*:

> [It] is a very difficult judgment to make in a community of 24,000,000 people who inhabit the second largest country in the world consisting of 3,831,012 square miles. No doubt very different levels of tolerance exist in small communities such as Goose Bay in Labrador, Dawson City in the Yukon and Nobleton in Ontario, and the large metropolitan centres of Montréal, Toronto and Vancouver. As well, Canada is a pluralistic society and different parts of that society will have different points of view. Yet it remains the task of the trier of fact, who is assumed to have his finger on the 'pornographic pulse' of the nation, to assess objectively whether or not the contemporary Canadian community will tolerate ... [the material] before the court.[30]

One of the reasons the test is so difficult

cases the court must determine the issue without the aid of evidence. Moreover, even when evidence of community standards is admitted, the judge is free to reject it and apply what, in the light of his own experience, he regards as the contemporary standards of the Canadian community.[31]

Although expert evidence on community standards is admissible, the weight given to it varies markedly from case to case and this variation cannot be attributed even primarily to the differing expertise of the witnesses. In general, the greatest weight is given to the evidence of witnesses such as provincial film censors, who are engaged full time in the task of judging community standards.[32] However, in a number of cases the evidence of these experts has been dismissed virtually without comment.[33] Other courts have given considerable weight to the testimony of such experts as city aldermen[34] and professors of health, education and psychology.[35]

There is simply no consistency in the cases as to who qualifies as a reliable expert on community standards, and what weight should be given to their evidence.

In addition to expert evidence, the courts have also considered various other kinds of evidence regarding community standards such as the actual rulings of provincial censor boards and Canada Customs officials,[36] examples of other material which is generally available in the community,[37] and surveys of public opinion.[38] Unfortunately, it is not clear precisely how much weight has actually been given to this evidence in cases where it has been considered.

Given the difficulties involved in the application of the community standards test, it is not surprising that there has not been any real consistency of results. There are, of course, a few things which everyone appears to agree cannot be tolerated. For example, the courts seem to agree that material which portrays incest,[39] juveniles engaged in sex,[40] or acts of severe cruelty or violence in combination with sex,[41] exceeds community standards, at least unless the material has significant artistic merit or a philosophical purpose.[42]

There now appears to be growing support, as well, for the proposition that material that "degrades" or "dehumanizes" one or more of the participants in the sexual activity that is portrayed, exceeds community standards of tolerance. For example, in *R.* v. *Doug Rankine Co.*, Judge Borins stated:

> films which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrade and dehumanize the people upon whom they are performed, exceed the level of community tolerance.[43]

This view was taken a step further in the recent judgments in *R.* v. *Ramsingh*[44] and *R.* v. *Wagner*.[45] In both of these cases, the judges held that material that "degraded" or "dehumanized" any of the participants would exceed community standards even in the absence of cruelty or violence.

It is apparent, however, that terms like "degrading" and "dehumanizing" material was obscene were to take firm hold in one would still expect to find conflicting decisions.

The differences of opinion in this area are particularly app involving material containing nothing more than explicit sex. Ac judges in the three cases just cited, material of this kind should be held not to exceed community standards of tolerance. As Judge Borins put it in the *Rankine* case,

> Contemporary community standards would tolerate the distribution of films which consist substantially of scenes of people engaged in sexual intercourse, ... scenes of group sex, lesbianism, fellatio, cunnilingus and oral sex.[46]

In *Re Luscher*, however, the judge found that a magazine "concerned with the sexual activity of a man and a woman from foreplay to orgasm" exceeded community standards even though the actions portrayed were "in no way unnatural or unlawful and, indeed ... are a common part of the lives of Canadian men and women".[47] And in a New Brunswick case, the trial judge found that community standards were exceeded by magazines which he described as follows:

> The magazines are most explicit and depict sexual conduct, not merely nudity. The conduct shows lesbianism, homosexuality and heterosexuality. Male and female genitalia are explicitly photographed.... There were no pictures depicting sex and 'the subject crime, horror, cruelty or violence' as set out in s. 159(8). The pictures appear to be of adults consenting to the sexual acts of other(s).[48]

Another striking example of inconsistency is found in two cases involving sex aids. A Nova Scotia County Court judge held in one case that lubricants, devices, prosthetics and novelties sold by a sex shop exceeded community standards of tolerance. In contrast, an Ontario County Court judge only three years before had concluded that similar products were not only tolerable, but in the public interest.[49]

The application of the community standards test has also produced inconsistent results in cases involving live performances. Some judges have found that the community standards of tolerance are exceeded when the whole of a person's body is exposed.[50] Others have found that complete exposure unaccompanied by suggestive touching, expressions or gyrations does not exceed community standards,[51] but that when the performance does include suggestive touching and gestures, it does exceed community standards.[52] Still others have found that the performance of a completely nude couple engaged in simulated sexual acts does not exceed community standards.[53]

Taking everything together, it is not difficult to agree with one judge who observed recently that:

> The lack of unanimity in the decisions of the courts in obscenity cases suggests that the Canadian contemporary community standard may very well

Footnotes

[1] S.C. 1892, c.29. The transmission through the post of anything of an "obscene, immoral, indecent, seditious, disloyal, scurrilous or libellous" character had previously been prohibited by s. 72(27) of the *Post Office Act*, S.C. 1875, c.7. This subsection was the antecedent of the present s. 164 of the *Criminal Code*.

[2] (1868), 3 Q.B.D. 360.

[3] *Ibid.*, at 371.

[4] *R.* v. *American News* (1957), 118 C.C.C. 152 (Ont.C.A.) at 154, 157 and 161.

[5] *Ibid.*, at 157-158, but see *R.* v. *Stroll* (1951), 100 C.C.C. 171 (Que. Ct. of Sessions), at 172 and *R.* v. *National News Co.* (1953), 106 C.C.C. 26 (Ont.C.A.).

[6] *R.* v. *American News*, (1957) and *R.* v. *St. Claire* (1913), 21 C.C.C. 350 (Ont.C.A.) but see *Conway* v. *The King*, [1944] 2 D.L.R. 530 (Que.K.B.) and *R.* v. *Stroll* (1951).

[7] S.C. 1959, c.41, s. 11.

[8] W.H. Charles, "Obscene Literature and the Legal Process in Canada" (1966) 44 *Can. Bar Rev.* 243.

[9] *R.* v. *Standard News Distributors Inc.* (1960), 34 C.R. 54 (Que.Mun.Ct.) and *R.* v. *Munster* (1960), 129 C.C.C. 277 (N.S.C.A.).

[10] [1962] S.C.R. 681.

[11] Judson, Abbott and Martland, JJ. for the majority and Kerwin C.J. in dissent.

[12] Ritchie, J. for the majority and Fauteux, J. in dissent.

[13] Cartwright, J. for the majority and Taschereau, J. in dissent.

[14] Locke, J. in dissent.

[15] The cases are collected in Robert E. Lutes, "Obscenity Law in Canada" (1974) 23 *Univ. N.B.L.J.* 30, at 36 and 37.

[16] (1977), 76 D.L.R. (3d) 1. (S.C.C.)

[17] *R.* v. *Brodie* (1962).

[18] *R. v. Odeon Morton Theatres* (1974), 16 C.C.C. (2d) 185 (Man.C.A.).

[19] *R. v. Doug Rankine Co.* (1983), 9 C.C.C. (3d) 53, (Ont.Co.Ct.).

R. v. Nicols 27 Nov. 1984, unreported (Ont.Co.Ct.).

R. v. Wagner, Jan. 1985, unreported (Alta.Q.B.).

[20] *R.* v. *Brodie* (1962), at 716.

[21] (1963) 2 C.C.C. 103. This judgment was adopted in its entirety by the Supreme Court of Canada on the later appeal of the case. See [1964] S.C.R. 251.

[22] *Ibid.*, at 116.

[23] *Ibid.*, at 117.

[24] *Ibid.*, at 116-17.

[25] *R.* v. *Benjamin News* (1978), 6 C.R. (3d) 281 (Que.C.A.) at 285.

[26] *R.* v. *Odeon Morton Theatres Ltd.* (1974).

R. v. *Towne Cinema Theatres (1975) Ltd.*, [1982] 1 W.W.R. 512 (Alta. Q.B.) Affirmed 12 May 1982, unreported (Alta.C.A.). S.C.C. reserved 28 Sept. 1983.

[27] *U. of Manitoba* v. *Deputy Minister of Revenue Canada* (1983), 24 Man. R. (2d) 198 (Man.Co.Ct.).

[28] *R.* v. *Sudbury News Services Ltd.* (1978), 39 C.C.C. (2d) 1 (Ont.C.A.) at 10.

[29] *R.* v. *Penthouse* (1979), 96 D.L.R. (3d) 735 (Ont.C.A.) at 741.

[30] *R.* v. *Doug Rankine Co.* (1983).

[31] *R.* v. *Great West News* 1970, 4 C.C.C. 2d 307 (Man.C.A.) at 315.

R. v. *Popert* (1981), 58 C.C.C. (2d) 505 (Ont.C.A.) at 508.

[32] *R.* v. *Towne Cinema Theatres* (1974).

[33] See, for example, *R.* v. *Daylight Theatre Co. Ltd.* (1973), 17 C.C.C. (2d) 451, (Sask.Dist.Ct.) at 455.

[34] *R.* v. *Doug Rankine Co.* (1983), at 58.

[35] *R.* v. *Minas Music Sales Ltd.* (1982), 109 A.P.R. 473 (N.S.Co.Ct.), *R.* v. *Wagner* (1985).

[36] *R.* v. *Doug Rankine Co.* (1983).

[37] *Re Luscher and Deputy Minister, Revenue Canada* (1983), 149 D.L.R. (3d) 243, (B.C.Co.Ct.) at 247.

[38] *R.* v. *Prairie Schooner News Ltd.* (1970), 1 C.C.C. (2d) 251 (Man.C.A.).

[39] *R.* v. *McDougall's Drug Store* (1982), 109 A.P.R. 463 (N.S.Co.Ct.).

R. v. *Cinema International* (1981), 13 Man.R. (2d) 337 (Man.Co.Ct.), affirmed, 13 Man.R. (2d) 335 (Man.C.A.).

[40] *R.* v. *Penthouse* (1979).

[41] *R.* v. *Doug Rankine Co.* (1983).

[42] *R.* v. *Towne Cinema Theatres* (1974).

[43] *R.* v. *Doug Rankine Co.* (1983), at 70.

[44] *R.* v. *Ramsingh* (1984), 14 C.C.C. (3d) 230 (Man.Q.B.).

[45] *R.* v. *Wagner* (1985).

[46] *R.* v. *Rankine Co.* (1983) at 70.

[47] *Re Luscher and Deputy Minister, Revenue Canada* (1983), at 245.

[48] *R.* v. *Saint John News Co. Ltd.* (1982), 124 A.P.R. 91 (N.B.Q.B.) at 100.

[49] *R.* v. *Harris* (1977), 43 A.P.R. 104 (N.S.Co.Ct.) and *R.* v. *Sutherland, Amitay and Bowie* (1974), 18 C.C.C. (2d) 117 (Ont.Co.Ct.).

[50] *R.* v. *Sidey* (1980), 52 C.C.C. (2d) 257 (Ont. C.A.).

[51] *R.* V. *Szunejko* (1981), 61 C.C.C. (2d) 359 (Ont. Prov. Ct.) and *R.* v. *Gray* (1982), 65 C.C.C. (2d) 353 (Ont. H.C.).

[52] *R.* v. *Campbell* (1974), 17 C.C.C. 2d 180 (Ont. Co. Ct.).

[53] *R.* v. *Kleppe* (1977), 35 C.C.C. (2d) 168 (Ont. Prov. Ct.).

[54] *R.* v. *Cinema International* (1981), at 342.

[55] *R.* v. *Sudbury News Services Ltd.* (1978).

[56] *R.* v. *Dorosz* (1971), 4 C.C.C. (2d) 203 (Ont.C.A.)

R. v. *Menkin* (1957), 118 C.C.C. 306 (Ont.Prov.Ct.).

[57] *Fraser et al* v. *The Queen*, [1967] 2 C.C.C. 43 (S.C.C.).

R. v. *Yip Men* (1970), 4 C.C.C. 2d 185 (B.C.Co.Ct.).

[58] *R.* v. *National News Co.* (1953), at 28.

[59] *R.* v. *Video Movieshop* (1982), 101 A.P.R. 321 (Nfld.S.C.).

[60] *R.* v. *Cameron*, [1966] 4 C.C.C. 273 (Ont.C.A.).

[61] *R.* v. *McFall* (1975), 26 C.C.C. 181 (B.C.C.A.).

[62] *R.* v. *Lee* (1971), 3 C.C.C. (2d) 306, (B.C.S.C.).

[63] *R.* v. *Video Movieshop* (1982).

[64] *R.* v. *Harris* (1977).

[65] *R.* v. *McFall* (1975).

[66] *Ibid.*

[67] *R.* v. *Odeon Morton Theatres Ltd.* (1974).

[68] *R.* v. *Kiverago* (1973) 11 C.C.C. (2d) 463, (Ont.C.A.).

[69] (1970) 3 C.C.C. 2d 149 (S.C.C.).

Section IV
Recommendations on Pornography

Chapter 20

The Criminal Code

1. Introduction

In making recommendations about changes in the *Criminal Code* we have drawn together all of the components of the work we have undertaken on pornography. Thus our recommendations flow from the guiding principles which we set forth in Part I, and are reflective of the current situation with respect to the availability and use of pornographic material, the harms which we feel are associated with this material and our views on the proper role of the criminal law in the area.

As we pointed out in Part I, Chapter 2 of the report, the traditional liberal view of the power of the state to limit the freedom of an individual is that the state can only act when the exercise of that person's freedom results in direct, demonstrable harm to others. By contrast the conservative view is that it is legitimate for the state to intervene to prohibit conduct in order to protect and affirm traditional moral values, even if there is no proven harm caused by the conduct to others. Mainline feminist opinion takes the middle ground that the state is justified in curbing the freedom of an individual where his conduct, while not necessarily causative of direct, demonstrable harm to others and regardless of whether or not it offends traditional moral values, does or threatens social harm in the sense that it undermines or subverts important social values and policies. In particular feminists see the equality of the sexes in political, economic, and social matters as so fundamental to the life and fabric of this country that action by the state both to promote and protect it are entirely warranted.

In our recommendations on changes to the *Criminal Code* relating to adult pornography we have applied a definition of harm which embraces not only direct, demonstrable harm to an individual, but also an element of social harm. In essence we see two forms of harm flowing from pornography. The first is the offence which it does to members of the public who are involuntarily subjected to it. The second is the broader social harm which it causes by undermining the right to equality which is set out in section 15 of the *Charter of Rights and Freedoms.*

The first of the two harms we argue should be handled by *Criminal Code* provisions which penalize failure to take steps to protect members of the public from involuntary encounter with pornographic material. The objective here is to encourage control and regulation rather than to proscribe. The second, we feel, requires direct proscription of certain forms of pornographic representations. Conscious of the concern that when the law moves beyond the prohibition of conduct which causes direct, demonstrable harm, there is a danger of excessive intrusion by the state into the lives of individuals, we have focussed on the most extreme forms of pornography. These in our minds clearly subvert the equality rights in the *Charter* and more generally the right of all individuals to be treated with respect and dignity. Moreover, they can be stated with sufficient precision to provide direction to those who have to gauge their actions according to the dictates of the law, and to the law enforcers so that undesirable interferences with freedom of expression are minimized.

We appreciate that our proscriptions will not satisfy everyone. Those of conservative mind will consider us too libertarian in our view that the bulk of pornography should be regulated rather than banned. Some feminists too may feel that we have circumscribed the pornography which is to be prohibited too narrowly. Liberals for their part may find our movement outside the traditional boundaries of harm untenable. It is our belief that, given the complexities of this area, and the conflict of philosophies to which it gives rise, our approach represents a rational, fair and realistic balancing of the interests involved, and a significant advance over the present state of the law.

2. Terminology

We were often told during the public hearings that a useful starting point for the reform of the law relating to pornography would be to remove the term obscenity from the *Criminal Code*. Along with obscenity would go the heading of the part of the *Code* in which it appears: "Offences Tending to Corrupt Morals".

Those who pressed for the removal of the term "obscenity" did so primarily because of their perception that sexual immorality was not really the essence of the offence in the pornographic material available today. Rather, in one way or another, the material is demeaning and degrading to women, to members of minority groups who may be portrayed in a distorted way, and ultimately to men, who are often depicted as soulless aggressors.

For some advocates of the change in terminology, the issue is not as ideologically significant. They are motivated by various reasons, ranging from a desire to signal a new approach, to a dislike of existing obscenity jurisprudence.

We agree with the suggestion that the term "obscenity" has outlived its usefulness. As we have discussed at some length in chapter 4, entitled "What is Pornography?", the fact that the dictionary definition of "obscenity"

Recommendations

transcends the legal definition in the
terms of section 159(8) have produced
word has little to offer as a term of
heading, with its emphasis on the cor
concern, one which deflects attention
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Recommendation 1

The term "obscenity" should no longer be used in the Criminal Code, and the heading "Offences Tending to Corrupt Morals" should also be removed.

We have already stated that we do not plan to make the term "pornography" central to the definitions in our proposed amendments. It is simply too elusive to provide the precision needed in the criminal law. However, we do not consider it worthwhile to eschew the term altogether. It does convey an idea about the material we are seeking to control and an entirely new term is not only difficult to find but may not be as accurate. Accordingly, we use the term pornography in our proposed sections, although we have been sparing in that use. The most obvious use is that in the various headings we have given to proposed sections. We see as quite acceptable the use of the term pornography in this way, because any elasticity in the title is limited by the specific terms of the section or subsection. Moreover, in the title, it serves as a useful indicator of the shift in approach from a traditional moral concern with obscenity, to our more functional social concern with pornography.

The term "pornography" appears rarely in the draft sections. In a few sections, we use the term "visual pornographic material", which is defined in quite particular terms to minimize discretion or subjective considerations. This definition is the only place in the draft provisions which actually features the term "pornography".

Recommendation 2

New criminal offences relating to "pornography" should be created, with care being exercised to ensure that the definition of the prohibited conduct, material or thing is very precise.

3. Violent and Degrading Material

In discussing the meaning of the word obscenity, in Chapter 4, Section II, we made the point that there is some material which would be considered obscene, but which would not be considered pornographic. Violent material which has no sexual connotations, and disgusting material, are the two large categories of material which might well not be caught by a "pornography" approach. We note with some interest, of course, that although common understanding might include the explicitly or extremely violent within the term obscene, because it causes revulsion, the present criminal law does not prohibit material featuring only violence.

The mandate of the Committee was to study the effect and make recommendations with respect to the material that has some sexual content. At the present time the *Criminal Code* considers potentially "obscene" material in which sex and one of a number of other items is present, namely, crime, horror, cruelty or violence. As we have reviewed the material which is available and listened to people across the country, the issue of whether violence in and of itself can be so offensive or harmful that some restrictions on it are needed arose quite frequently.

Virtually everyone who raised the issue thought that violence on its own can indeed be obscene. In fact, some people who raised the issue believed that violence in the media was more of a problem than explicit sexual portrayals. The term "obscene" used in the *Criminal Code*, could, in our opinion, easily include more than just sexual material, although as we have indicated it does not currently do so. We did consider whether the retention of the term obscene would be preferable because it could allow for offensive non-sexual material to be caught. We decided, however, that we would not recommend such a course of action because it would be building yet more meaning into a term which is already highly problematic. Our focus has been on pornographic material and we propose significant changes to the way in which the *Code* deals with such material. We have not examined in any detail the problems associated with violent material that has no sexual content. Nevertheless, having given some attention to the matter, we are of the opinion that the government should give consideration to establishing a section in the *Code* which would deal with violent material in a manner similar to the one we are proposing for sexual material. We realize that a sanction against violence is potentially far-reaching and intrusive and careful study is necessary before changes to the law can be recommended.

Recommendation 3

The federal government should give immediate consideration to studying carefully the introduction of criminal sanctions against the production or sale or distribution of material containing representations of violence without sex.

There is at least one offence in the present *Code* which does relate to disgust: subsection 159(2)(b) prohibits the public exhibition of a "disgusting object". In our view, little that is necessary for the protection of basic values would be lost by removing altogether the penalties against material that is disgusting, provided that the criminal law regime we are recommending is in place. We have reached this conclusion because we have tried to address in our proposed sections the real harms which we think were aimed at by the prohibition against such material, like the public display of sex aids. In particular we have replaced the prohibition on the public exhibition of disgusting objects, with a section aimed at preventing access (by way of sale or display) by children to devices intended for use as sex aids. This is found in the part of the report relating to children.

Recommendation 4

There should be no sanctions introduced respecting material that is 'disgusting' even though our proposed repeal of section 159 would remove the existing offence relating to a disgusting object.

4. What to Control?

It was apparent at the public hearings that many people thought that the portrayals of women and children in the media generally were distorted and false depictions. We were frequently reminded that women are often seen in limited and mindless roles in television programs, as overwhelmingly concerned (to the exclusion of other interests) with marriage in popular paperback series, and as people whose sexuality can be used to sell virtually any commodity. On this view, pornography is one variant of a pervasive and dominant theme that runs through all the media, albeit a more extreme variant than some others. The argument has been raised, however, that pornography may be less harmful than the everyday, run-of-the-mill depictions in the media which we so often take for granted. This view stems from the belief that, as widespread as pornography is, the mainstream media touch the lives of virtually every single Canadian whether man, woman or child. Therefore, to seek to control what is probably a small percentage of the false depictions and leave out of the picture the vast majority of them is inconsistent and most certainly not going to achieve the result which we are ultimately seeking, that is, a reduction or elimination of such depictions.

While the Committee has every sympathy for this view, we do not believe that the elimination of false depictions of women can be achieved through *Criminal Code* provisions. What is required is re-orientation of the values and priorities of the media. This is not something that can be addressed through criminal law. Given the sheer volume of material which would be involved, criminal sanctions would not be effective and more likely to bring the law into disrepute than to solve the problem.

Moreover, broad based support is lacking at this time for the view that the content of the media is in need of the sort of re-orientation we have heard suggested. Certainly, many women's organizations see this as an important issue, one to which they are continually and effectively drawing people's attention. Similarly, religious and ethnic associations have been concerned about how they are portrayed in the media. But the efforts of these groups, especially women's goups, are quite recent in origin and have not, we think, been accepted into our everyday assumptions about the media and its content. That we are moving in the direction of accepting them is seen by the adoption of new content guidelines by the CRTC and amendments to the *Broadcasting Act*. However, these changes have not been accomplished simply for the asking, but have involved long and intensive lobbying and negotiations between interested groups, governments and the media.

We are, therefore, in need of extensive educational and informational programs to address the concern that some have about general media content and its portrayal of people. The use of the criminal law is neither an appropriate nor a practicable means for counteracting such a pervasive problem. That is not to say that legal strategies are inappropriate. Given the existence of regulations governing the media, it is certainly legitimate in our view to use the regulatory process to address these issues. Indeed, the Committee makes a series of recommendations relating to the control exercised by the CRTC over programming which are designed to combat sexist messages in the broadcast media.

The question then becomes whether or not there is any material which is so extreme or harmful in its depictions that it is qualitatively different from the general content and for that reason deserves to be treated differently. In essence, is there any material which should be subject to criminal sanction if it is produced, sold or displayed, for example? Canada, along with other western countries has so far answered "yes" to this question.

As we have already noted, we are convinced that some material of a sexual nature can be so damaging to individuals and society that it must be the subject of the criminal sanction. The crux of the issue, of course, is to define the precise nature of the material which should be prohibited or regulated in such a way as to include only the specific sorts of things which are harmful. Our ability to do this depends on our understanding of what it is about the material which causes the damage.

It is, in our view, a significant social fact that many people are offended by some kinds of material. They would not choose to view it, if given a choice, and they are offended or upset when they cannot avoid seeing it. These feelings of offence and disgust can, in our estimation, justify restraints on the display of pornography, although we do not think that these sentiments would justify criminalization of, say, producing the material. The feelings of embarrassment of individuals, no matter how many, are not a proper basis for a substantial curb on freedom of speech.

How far should the boundaries of control be extended beyond restraints on display of offensive material? As our analysis of pornography in Canada today, in Chapter 6 of Section I demonstrates, we do not have consistent and conclusive research data to tell us about all the effects of pornography and in particular whether direct, demonstrable harm is caused, and we cannot be drawn too far into surmise or speculation. Our approach is characterized by acceptance of the egalitarian argument that impairment of a fundamental social value can properly be regarded as a "harm" meriting legislative control.

Proceeding from this point of departure, we have developed a three-tier analysis of pornographic material. The first tier is material which we would subject to a criminal sanction, with no defences based on artistic merit, educational or scientific purpose. The penalties for the offence are strong. In this tier we place the following: a visual representation of a person under 18 years of age participating in explicit sexual conduct and material which advocates, encourages, condones or presents as normal the sexual abuse of children; and visual pornographic material which was produced in such a way that actual physical harm is caused to the participant or participants.

The case with respect to these forms of pornography has been made very fully in the part of the Report dealing with children and we do not intend to repeat it here.

With respect to the remaining category, there are, in our view, two reasons for prohibiting visual material in the production of which actual physical harm was caused to the person or persons depicted. The first and obvious one is to protect those who participate in the production of visual pornographic material from physical harm. It is likely, of course, that in the case of material produced ouside Canada the acts that would result in such harm being caused would themselves be caught by the criminal law of the country in which they were committed. With domestically produced material, other provisions in the *Criminal Code*, for example those relating to assault, might be applicable, especially if no consent to the physical harm was evident. Be that as it may, it seemed to us, as it seemed to the Williams Committee, to be appropriate to provide this additional deterrent to the causing of such harm. We know that the relations between the producers of violent pornography and the actors in it are often such that there is little or no respect for the rights and physical welfare of the latter. Clearly, if the commercial dealings in material of this kind could be stopped, the reason for producing it would disappear.

The second reason for prohibiting this material lies in the message that most, if not all, of it conveys. That message is that it is acceptable to cause physical harm in the context of sexual relations. Whether or not it can be demonstrated empirically that this message is absorbed by the viewer, and acted upon, we believe that it is appropriate to use the criminal law to prohibit its dissemination. The social harm which is caused by the undermining of human dignity and the challenge to the equality of women is as stark here as it is with mere representations of physical harm. We elaborate on this facet of harm in our discussion of tier two material below.

We do not anticipate that this provision will often be activated. We doubt that the causation of actual physical harm is a widespread problem in the production of pornography. Moreover, there are obvious problems of proving that harm was actually caused. However, it will be available for dealing with the occasional outrageous case.

Far more pervasive is the material in which physical harm or abuse is represented in simulated depictions. This material which we consider offends equality rights and the more general right to respect for human dignity is dealt with in the second tier and is labelled "Sexually Violent and Degrading Pornography". Unlike the material in tier one, that in the second tier is subject

to the defences of genuine educational or scientific purpose, and artistic merit. The rationale for allowing defences is set out below in our discussion of the new formulation of section 159 of the *Criminal Code*.

We consider it important to comment at some length on why we have included this second tier, and the character of the harm which we feel justifies the intrusion of the criminal law at this point. As we stated in the introduction to this chapter we have concluded that the legitimate ambit of the criminal law extends beyond the causation of demonstrable, tangible harm to an individual or individuals. While recognizing the concern which liberals have that to extend the reach of the criminal law further is to open the door to abuse and possibly tyranny, we believe that there are values and policies which are so important to the welfare of Canada that they are worth protecting in their own right, even by criminal sanctions. This position which we have adopted seems to us to accord with the view taken by both the Law Reform Commission of Canada and the Department of Justice in their studies on the purposes of the criminal law.[1] As we have noted in our discussion of the role of criminal law in Part I, Chapter 2, the two studies see the criminal law as having both the prevention and penalizing of harm to the individual and the protection of social values as legitimate objectives.

More importantly, we believe that the *Charter of Rights and Freedoms* expressly recognizes that certain social values and policies, in particular equality "before and under the law" and "equal protection and equal benefit of the law" are entitled to both constitutional affirmation and protection, and take their place alongside the traditionally protected freedoms such as freedom of conscience, religion, thought, belief, opinion and expression. In our minds there are two possible legal consequences which flow from this recognition accorded to equality rights. In the first place it may be argued that the effect of section 15 of the *Charter* is to limit the ambit of freedom of expression in section 2(b) to exclude forms of expression which offend equality rights. The alternative position one can take is that the combined effect of section 15 and section 1 which comtemplates reasonable limitations on the rights and freedoms set out in the *Charter* is to validate reasonable legal constraints, including those of the criminal law, on the exercise of rights and freedoms by individuals or groups which adversely effect or threaten the rights in section 15.

While observations on the effect of the *Charter* are in many respects still speculative, we note that the position which we have taken does have judicial support in the careful judgement of Mr. Justice Quigley of the Alberta Court of Queen's Bench in *R. v. Keegstra*,[2] a decision to which we have already referred to in Part II, Chapter 8, where we discuss the general impact of the *Charter* in relation to the issue of pornography. Mr. Justice Quigley in addressing the issue of whether section 281.2(2) of the *Criminal Code* (wilfully promoting hatred against any group by communicating statements) was an infringement of "freedom of expression" under section 2(b) of the *Charter* made the following remarks:

> Section 15 of the *Charter* guarantees a right which rationally flows from our affirmation that men remain free only when freedom is founded upon respect for moral and spiritual values. We have recognized that Canadians have a moral sense, that is a sense of what is good and what is evil. Section 15 also manifests in the concrete as opposed to the abstract, our affirmation that each human person has dignity and worth...[3]
>
> In my view, the wilful promotion of hatred under the circumstances which fall within section 281.2(2) of the *Criminal Code* of Canada clearly contradicts the principles which recognize the dignity and worth of the members of identifiable groups, singly and collectively; it contradicts the recognition of moral and spiritual values which impels us to assert and protect the dignity of each member of our society; and it negates or limits the rights and freedoms of such target groups, and in particular denies them the right to the equal protection and benefit of the law without discrimination.[4]

The judge concluded that section 2(b) of the *Charter* did not contemplate "an absolute freedom permitting an unbridled right of speech or expression". Furthermore, if he was wrong in this view, he found that section 1 provided a basis for balancing that freedom against the furtherance and protection of desirable social policies and values with which it conflicted in certain contexts. After carefully assessing the rationality and proportionality of the *Criminal Code* provision, and comparing it with the laws and customs of other free and democratic societies, he concluded that the "promoting hatred" provision in the *Code* constituted a reasonable limitation on freedom of expression.

We agree with the views and sentiments expressed in Mr. Justice Quigley's judgement, and we believe that they have application in the present context. In the same way that freedom of expression may not extend to statements wilfully promoting hatred, or be outbalanced by the need to protect the equality rights of others, so the same conclusions can be reached in the case of certain forms of pornographic representations. We believe this to be so in particular in those cases in which the pornographic representation depicts a particular group, typically women, as less than human, and their mistreatment as a legitimate subject of sexual stimulation, typically male. We observe that section 15 of the *Charter*, insofar as it addresses the equality rights of women, represents the culmination of a long and agonizing process whereby Canadian society has come to accept and to commit itself to the policies and values associated with equal treatment of the sexes in the political, economic and social spheres. This has been reflected in both legislative and policy strategies to improve the position of women in employment, education, within the social welfare system and within the family unit. Indeed, it is a set of policies and values to which the present government has given its unqualified support in recent policy announcements relating to equal opportunity in employment. In our opinion the most hateful forms of pornography are subversive of policies and values favouring equality. While it may be difficult to characterize the representations as amounting to the promotion of hatred, they do contain a clear message that half of the Canadian population are entitled to nothing better than violent, sexual abuse, all in the cause of the supposed sexual and psychic welfare of the other half. They do so in a context, that of sexual relations, in which a combination of a desire to dominate and emotion can pose

significant da... pointed out in Part I, Chapter 2, we recogniz... person's status as an adult, and the need to r... l and psychic welfare of each individual. H... are necessary limits to how that sexuality is n... of tolerance are reached when domination a... p. While it is not proven that representatio... ce pose the same threat to the welfare of women as the conduct itself, we are of the view that they lower the status of women and thus contravene their right to equality. In fact they strike at the very root of the policies and values of Canadian society, which, as Mr. Justice Quigley observed, are premised on the dignity and worth of all its members.

We recognize that sexually violent and degrading pornography is not limited in its focus to the abuse of women. There is some material produced in which similar conduct is depicted in a homosexual context. It may be difficult to bring these representations within the ambit of section 15 of the *Charter*. However, we are of the view that while that may be true, the material nevertheless offends the value of respect for human dignity of which Mr. Justice Quigley spoke in *Keegstra* and which is obviously broader in its scope than section 15. Accordingly, we think that a proscription against it of the type we suggest can be justified as a reasonable limitation on freedom of expression and thus saved by section 1 of the *Charter*.

Having taken this stand we are of course aware of the limitations of the criminal law in promoting and protecting values, especially where there is no or only speculative harm being caused. Moreover, we know that the criminal law can be a blunt and inappropriate instrument for working social change. We are, however, confident that with careful attention being paid to the material which we see as destructive of the social consensus which we refer to above, and the clear articulation of the conduct which we think should be proscribed, a valid statement of criminal law can be made, which not only sets out with clarity the limits of what is acceptable and unacceptable in Canadian society in terms of pornography, but also which can be enforced effectively without creating unwarranted curbs on freedom of expression.

Although it is mainly violent and sexually abusive material which we have focused on in framing our second tier recommendations for amendment of the *Criminal Code*, we have also thought it appropriate to apply the criminal law to representations which, while they do not offend the equality provisions of the *Charter* do depict conduct, such as incest, bestiality or necrophilia, which is considered socially repellent and personally degrading. We find it difficult to see how representations of such conduct would be protected by freedom of expression. Even if that freedom was extended that far, we believe that the concern to uphold social values, which is evident both in deepseated revulsion to this type of behaviours, and in its criminality, justify reasonable limitation of the freedom in terms of section 1 of the *Charter*.

Having state... material, we do a... within the purvie... Some people wi... relationship betv... particular individ... how the legislatic... inadvertently enc... at which the legislation is aimed.

It was this latter problem that led the Committee to recommend that sexually violent and degrading material be prohibited and to state as clearly as possible what we mean by those terms. We have consciously rejected the use of broad terminology which would leave the characterization of the material to a test, such as the present test of community standards of tolerance.

The community standards test has been soundly criticized by everyone who has been affected by decisions made under it. Most of the criticism is directed at the impossibility of knowing what the Canadian (i.e. national) community standard is. It has been pointed out by judges, and demonstrated by other judgements, that the standard is subject to regional variation. Moreover, the standard changes over time so that publishers, for example, can only guess at what the standard is in any given year. Furthermore, while a changing standard has some value to it in that it ensures that the law does not become completely out of tune with current realities, it does give rise to what some people at the public hearings referred to as "creeping gradualism." (In the minds of some it was not so much creeping as galloping.) That is, the most extreme material which is allowed becomes the standard against which everything else is measured. The technique of publishers, therefore, who do not want any restraints on what they can produce is to constantly push the boundary of what is considered to be outside the law.

A further criticism of this test is that it lacks a principled foundation. Simply because a majority of Canadians are said to tolerate or not tolerate something tells us nothing about their reasons for doing so and hence gives us no opportunity to decide whether they are indeed valid. It is our view that decisions in respect to criminal charges should be made on the basis of clearly articulated principles and not on the basis of majoritarian impulses.

Much of the material which people brought to the attention of the Committee was presented as material which degrades women. While we have argued that some pornographic material is harmful to our fundamental values, and in this sense we have concurred with those who see it as denying women equal status with men, we have nevertheless not used the term "degrading" in our proposed amendments to the *Criminal Code*. The term appears as a heading to the material which we believe is the most subversive of social values. In this sense it is an appropriate heading for the section since it highlights what we consider to be the problem with the material. We have not, however, used the term in our specific recommendations because we consider it to be too

imprecise and too broad in its connotations. As we have argued, much of what appears as mainstream pornograhy could be characterized as degrading to women. We do not want to run the risk of our definitions being cast so broadly that they are struck down by the courts on the ground of vagueness or because they catch too much. Furthermore, the use of the term "degrading" would result in a more subjective element being introduced into the assessment of the material. The variable scope ascribed to the term "degrading" during the public hearings, and the occasional but worrying challenges made to literary works which treat sexual relationships openly and sensitively illustrate the difficulties which exist with interpreting such a term. We have tried as far as possible in framing our recommendations to minimize the opportunities for subjective judgements. Our approach here, as elsewhere, has been to state what depictions or descriptions are unacceptable as precisely and clearly as we can.

The third tier of materials is one which we do not consider merits criminal sanction, except in very narrow circumstances. This third tier consists of "visual pornographic material", defined as material in which is depicted vaginal, oral or anal intercourse, masturbation, touching of the breasts or genital parts of the body, or the lewd exhibition of the genitals. Although the language of the definition is broad enough to include both explicit material involving children and sexually violent pornography, we wish to make it clear that in our view, neither of these kinds of materials falls within tier three. These two forms of materials fall into tier one and tier two respectively.

In drafting this provision, we have been mindful of the difficulties of trying to devise a comprehensive list of activities, the depiction of which is to be controlled. These difficulties led the Williams Committee to recommend, instead of a list, a test of offensiveness, which turned on the sensibilities of the "reasonable person". We have concluded that such a flexible test would be more problematic in its operations than the use of a list. The latter is likely to provide clearer guidance on the type of material which is caught. While our list may require further refinement, we are inclined to believe that it is adequate to the task of characterizing tier three material.

It will be noted that we have employed the term "lewd" to describe certain of the representations in the definition. We do this because we wish to make it clear that it is not all representations of the breasts or genitals which should be caught by this definition. It is obviously important to distinguish a poster centre fold of *Playboy* which should be caught as tier three material, and a poster of Michaelangelos' *David* which should not. The use of the adjective "lewd" is designed to allow the law to discriminate between what is patently offensive when displayed in public and what is not.

We think that the only problem which merits the application of the criminal law in connection with tier three material, is that of display. Accordingly, we have proposed criminal penalties for displaying the material without a warning in premises to which the public has access, as well as the restrictions on sale to and access by children which is included in the children's part of this report. We believe that the provisions provide the necessary safeguards against involuntary offence and the exploitation of ch
curtailing freedom of expression.

Although we have devised this three-tier approach primaril
thinking on the criminal law, we believe that it also serves to
well, the relation between the federal and the provincial spheres
the proper approach is for the provinces to concentrate their reg
on the tier three material. We would hope to see a regime in whi
the recommended display offences, tier three material is entirel
the province. The main question with respect to this material is
that its potential to create offence to adults or do harm to ch
contained. Provincial film regulation schemes and municipal d
seem particularly well suited to this role.

We have agreed in Chapter 14 on film classification and
film and video material which does not fall within the proscr
recommended in the *Criminal Code*, should be subject to class
than censorship. Accordingly, in the case of film or video mate
within tier three the application of a classification or ratin
attendant warnings and entrance restrictions, would seem t
satisfactory way of dealing with the display problem. In the cas
material, especially magazines, we believe that municipal regul
warnings, barriers, or opaque covers is an appropriate method
Provincial law and municipal by-laws of the type mentioned ab
have application to tier two material which is protected by t
genuine educational or scientific purpose or artistic merit.

Recommendation 5

Controls on pornographic material should be organized on the basis of a three-tier system. The most serious criminal sanctions would apply to material in the first tier, including a visual representation of a person under 18 years of age, participating in explicit sexual conduct, which is defined as any conduct in which vaginal, oral or anal intercourse, masturbation, sexually violent behaviour, bestiality, incest, necrophilia, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals is depicted. Also included in tier one is material which advocates, encourages, condones, or presents as normal the sexual abuse of children, and material which was made or produced in such a way that actual physical harm was caused to the person or persons depicted.

Less onerous criminal sanctions would apply to material in the second tier. Defences of artistic merit and educational or scientific purpose would be available. The second tier consists of any matter or performance which depicts or describes sexually violent behaviour, bestiality, incest or necrophilia. Sexually violent behaviour includes sexual assault, and physical harm depicted for the apparent purpose of causing sexual gratification or stimulation to the viewer, including murder, assault or bondage of another person or persons, or self-infliction of physical harm.

Material or productions in the third tier would attract criminal sanctions only when displayed to or performed before the public without a warning as to their nature or sold or made accessible to people under 18. Unsolicited mail incorporating such material is also included. In tier three is visual pornograhic material or performances in which are depicted vaginal, oral, or

anal intercourse, masturbation, lewd touching of the breasts or the genital parts of the body or the lewd exhibition of the genitals, but no portrayal of a person under 18 or sexually violent pornography is included.

Recommendation 6

The provinces and the municipalities should play a major role in regulation of the visual pornographic representations that are not prohibited by the Criminal Code through film classification, display by-laws and other similar means. The provinces should not, however, attempt to control such representations by means of prior restraint.

5. Offences Relating to Pornographic Material

5.1 Section 159

The basis upon which we have constructed this replacement for section 159 has been discussed in the first part of this chapter, and so we will not repeat it here. However, we do wish to highlight certain features of the proposed legislation.

The first thing to note is the terminology we have used. We have tried for the most part to be specific in our choice of terminology, avoiding the use of vague words such as "degrading". As a result, we have drafted our offences in terms of descriptions of certain kinds of acts. The offences in relation to tier two material, for example, contain a list of acts like incest, bestiality and necrophilia. These acts are, in and of themselves, criminal offences. The term "sexually violent behaviour", which also appears in the list, is defined to include "physical harm depicted for the apparent purpose of causing sexual gratification to or stimulation of the viewer". This general part of the definition recognizes that the element of context has an important role to play in determining whether portrayals of physical harm are wrongful. More especially, it embraces the combination of violence and sexual conduct, and violence and sexual stimulation which we consider to be so destructive of the dignity and worth of human beings in general, and women in particular. To supplement the general formulation, we have given specific examples, like murder, and self-inflicted harm. All of the elements of this list except for self-inflicted harm are, once again, crimes. We include self-inflicted harm because it is typically portrayed in a context which makes it appear that the actor, usually a woman, enjoys and deserves the pain. This we see as just as objectionable as the representation of physical violence by others, which suggest the legitimacy of such conduct, and worse still, its acceptance by the victim. By thus staying close to what is itself criminal in formulating our definition, we hope to avoid making it so broad that it would catch images which, while perhaps objectionable, should not be criminalized. We wish to note in this connection the two definitions of "visual pornographic material" which appear in the proposed section. One of them, which applies in the case of section 159(1), reflects both the sexually explicit and the sexually violent. However, when we come to define "visual pornographic material" in dealing with the offence of displaying tier three material, we have removed from the definition the phrases sexually violent behaviour, necrophilia, incest and bestiality. We also specify that this class of representations does not include pornographic representations of children, material advocating the sexual abuse of children, or material in which it appears that harm was done to the participants.

In drafting the offences to deal with tier one and tier two material, we have maintained the distinction now made in section 159 of the *Code* between those who produce and distribute prohibited material and those who are involved in the retail trade in such material. In our view, a distinction along these lines is appropriate in this area for two reasons. First, it allows for recognition to be given in the *Code* to the fact that producers and distributors of material of this kind are in a better position to know its content than are retailers. Recognition of this fact, which is now reflected in section 159(6) (i.e. that ignorance of the nature or presence of the material is no defence) we have embodied in both a new section 159(5) and a new section 159(6). The former is a slightly revised version of the existing 159(6); it provides that it is no defence for a producer or distributor to show that he was ignorant of the character of the "matter or thing" in question. The latter makes provision for a "due diligence" defence for retailers.

The "due diligence" defence is intended to protect the responsible merchant who tried to review the materials coming into his establishment, and to comply with the law. We realize that merchants are not going to be able to interpret in every case what is and is not within the section. However, the fact that they have tried will be of help in the event of a prosecution. The conduct we wish to deter is that of the merchant who accepts without question any material provided by a distributor, and pays no attention to those whose rights are adversely affected by it.

The second reason for distinguishing between producers and distributors on the one hand, and retailers on the other, lies in the need to ensure that the punishment fits the crime. In our view, the production and distribution of prohibited material has to be treated more harshly than the retail trade in it. It is well known that it is in the production and distribution of this material that the real profits are made, and the penalties for such activities must be severe if the law is to have any significant deterrent effect.

In proposing that this distinction is to be continued, the Committee has not forgotten that the Ontario Court of Appeal has held that the existing section 159(1)(a) and section 159(2)(a) overlap to some extent.[5] It is clear that, to the extent that these two offences do overlap, the purposes underlying the distinction are defeated. We have attempted to deal with this problem both by making it clear that the rental of prohibited material is caught by the retailing offence and by removing the word "circulates" from the producing and distributing offence. We are not overly confident, however, that these changes will succeed in overcoming the Ontatio Court of Appeal's decision. It may be, therefore, that further changes to the language used in these sections will be necessary.

It will be noted that in our formulation of section 159(2), Sexually and Degrading Pornography, we have included the defences of educational or scientific purpose, and artistic merit. It is important state our reasons for these exceptions which are contained in section 15 and (c).

The defence of genuine educational a scientific purpose reflects ou that in certain contexts the production, distribution and sale of this material may be quite legitimate. While descriptions of incestuous relationships of the sort described in some entertainment magazines are clearly not tolerable very detailed descriptions of incestuous relations, perhaps with explicit photographs of the physical harm done to a young victim of incest by an adult, are entirely appropriate within a medical setting or the training of professionals who work with families in trouble. Here the material is acceptable or unacceptable not on the basis of what it describes or depicts but on the basis of its purpose. However, materials produced for genuine educational or scientific purposes may be sold for less noble reasons. We have provided for this contingency by relating the defence in the case of retailers both to the original purpose of the material and the purpose of its sale.

Some people will argue that there can be no such thing as an artistic defence of material which is sexually violent. Because the depiction meets some academic or elitist concept of artistic does not make it any more acceptable. While we have sympathy with this view we consider it essential to provide for such a defence in order properly to balance the competing rights of equality and freedom of speech. Both of these are entrenched in the *Charter* and clearly the law cannot be used to support one to the total exclusion of the other. Artistic and literary endeavours are a vital component of our society and as such have to be protected and encouraged. That they sometimes raise uncomfortable questions, treat controversial topics and present unpopular views is to be expected. It would not be acceptable to us to say that the matters dealt with in the second tier cannot be presented in artistic works. Indeed, to say so would be to put a significant range of artistic and literay material dating back to antiquity at risk. We wonder, for example, how these two ancient Greek classics, "Oedipus Rex" and "Electra", and the work of the Roman historian Suetonius would fare without such a defence. In some cases the need to protect freedom of expression must predominate.

We note in passing that the Committee has considered two different approaches to artistic works that might fall within the ambit of our second tier. On the one hand, it can be argued that because the work in question is, indeed, artistic, its message is different from, for example, the message in a similar depiction or description in an "adult entertainment" magazine. The fact that it is art, on this view, transforms the depiction or description into something which is no longer harmful. On the other hand, it might be said that both the artistic work and the adult magazine contain an equally harmful message but that in the former case the genre is of sufficient importance that we will nevertheless protect it. While the Committee has adopted this latter view, it should be noted that the question of whether works of art can be pornographic

whether those terms are mutually exclusive has been the subject of iderable discussion in academic literature.

We recognize, of course, that these defences, especially that of artistic t, introduce a subjective element into the determination of what is ographic for the purposes of the criminal law. Given our concern to strike lance between the protection of equality rights, and freedom of expression, we cannot see how that can be avoided. Moreover, we are of the view that decision makers with the benefit of the evidence of expert witnesses will have less of a problem distinguishing what is artistic from what is not than they do with applying the present slippery test of what is obscene. Instead of trying to define the answer to the broader question of what the Canadian community would consider tolerable, they will have to reach a determination of artistic worth by considering the producer or maker's purpose, together with its status within the artistic or literary community. While this will no doubt be a challenging task, we think that it will be a manageable one. The process of decision making is certainly assisted by section 159(2)(h) which establishes the contexts in which the impugned material is to be judged and differentiates them depending upon whether the material is part of a more extensive production or story, or merely a detached segment.

We have included within section 159(2)(c) a display provision relating to Sexually Violent and Degrading Pornography. We think it important to distinguish this method of dealing with proscribed pornographic material from its sale and rental, in particular because it is necessary to provide for material which falls within the exceptions allowed by section 159(2)(d) and (e). It would obviously not make sense for material which, were it not for its purpose or character, would be proscribed, to be displayed openly and without regulation.

It will be noted that in relation to both exempted sexually violent and degrading material by section 159(2)(g) and tier three material by section 159(3)(b) we have stipulated that no one shall be convicted of the offences where an adequate warning notice has been located where it can be seen by those entering the premises or part of the premises which contain pornographic material. The Committee considered whether an exemption should be included for museums, art galleries and the like. Some of its members felt a little disconcerted by the realization that establishments like the Royal Ontario Museum, for instance, might be required to post warning notices because of concern about the possibility of pornography lurking within their walls. Attempts to draft such an exemption floundered on the issue of how to ensure that the exemption would only be available to legitimate establishments of this type. For this reason an exception has not been included.

The penalties provided in the draft section are intended to reflect our view of the seriousness of these offences. Many of them are higher than the penalty now provided for breach of section 159. Where possible, we have specified the amount of the fine which can be imposed by a court convicting someone of a summary conviction offence. Subsection 722(1) of the *Code* provides that

where there is no other provision made by law, a fine of $500 or six months imprisonment or both can be imposed for a summary conviction offence. While we have no objection to the six months imprisonment, and reflect that in our sections, we consider that the maximum fine of $500 was far too low. In some cases, we have made that a minimum fine.

Because of the provisions of paragraph 647(b) of the *Code*, we cannot impose these higher penalties upon a corporation convicted of a summary conviction offence. Elsewhere, in Part IV on Children, we recommend that paragraph 647(b) be amended, so as to provide for a higher penalty for a corporation convicted of a summary conviction offence, or to allow the drafter to attach to any particular offence a penalty higher than that set out in paragraph 647(b).

We have, however, provided for a penalty against an officer of a corporation who is implicated in the commission of the offence. We believe this to be essential in making it clear that legal responsibility for the production, distribution, sale, rental or display of this material is both a personal and a corporate responsibility. More particularly it obviates the possibility that the human agents in dealing with the material will try and shield themselves by shifting responsibility to the corporate entity.

Finally, we have incorporated a forfeiture provision in proceedings under section 159(1)(a) and (b) and 159(2)(a) and (b) which allows the Crown to dispose of offensive materials and copies thereof. This power is important, if the full implications of a conviction are to be realized. Without it, it would be all too easy for other distributors or retailers to continue dealing in the material which had produced a conviction, leaving to the Crown the sole recourse of further prosecutions.

Recommendation 7

Section 159 of the Criminal Code should be repealed, and replaced with the following provision:

PORNOGRAPHY CAUSING PHYSICAL HARM

159(1)(a) Everyone who makes, prints, publishes, distributes, or has in his possession for the purposes of publication or distribution, any visual pornographic material which was produced in such a way that actual physical harm was caused to the person or persons depicted, is guilty of an indictable offence and liable to imprisonment for five years.

(b) Everyone who sells, rents, offers to sell or rent, receives for sale or rent or has in his possession for the purpose of sale or rent any visual pornographic material which was produced in such a way that actual physical harm was caused to the person or persons depicted is guilty

(i) of an indictable offence and is liable to imprisonment for two years, or

(ii) of an offence punishable on summary conviction and is liable to a fine of not less than $500 and not more than $2,000 or to imprisonment for six months or to both.

(c) "visual pornographic material" includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, sexually violent behaviour, bestiality, incest, necrophilia, masturbation, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals.

SEXUALLY VIOLENT AND DEGRADING PORNOGRAPHY

159(2)(a) Everyone who makes, prints, publishes, distributes or has in his possession for the purposes of publication or distribution any matter or thing which depicts or describes:

(i) sexually violent behaviour; — see s. 159(8) →

(ii) bestiality;

(iii) incest, or

(iv) necrophilia

is guilty of an indictable offence and liable to imprisonment for five years.

(b) Everyone who sells, rents, offers to sell or rent, receives for sale or has in his possession for the purpose of sale or rent any matter or thing which depicts or describes:

(i) sexually violent behaviour;

(ii) bestiality;

(iii) incest, or

(iv) necrophilia

is guilty

(i) of an indictable offence and is liable to imprisonment for two years, or

(ii) of an offence punishable on summary conviction and is liable to a fine of not less than $500 and not more than $1,000 or to imprisonment for six months or to both.

(c) Everyone who displays any matter or thing which depicts or describes:

(i) sexually violent behaviour;

(ii) bestiality;

(iii) incest; or

(iv) necrophilia

in such a way that it is visible to members of the public in a place to which the public has access by right or by express or implied invitation is guilty of

(i) an indictable offence and is liable to imprisonment for two years, or

(ii) an offence punishable on summary conviction and is liable to a fine of not less than $500 and not more than $1000 or to imprisonment for six months or to both.

(d) Nobody shall be convicted of the offence in subsection (2)(a) who can demonstrate that the matter or thing has a genuine educational or scientific purpose.

(e) Nobody shall be convicted of the offence in subsection (2)(b) who can demonstrate that the matter or thing has a genuine educational or scientific purpose, and that he sold, rented, offered to sell or rent or had in his possession for the purpose of sale or rent the matter or thing for a genuine educational or scientific purpose.

(f) Nobody shall be convicted of the offences in subsections (2)(a) and (2)(b) who can demonstrate that the matter or thing is or is part of a work of artistic merit.

(g) Nobody shall be convicted of the offences in subsection (2)(c) who can demonstrate that the matter or thing

(i) has a genuine educational or scientific purpose; or

(ii) is or is part of a work of artistic merit,

and

(iii) was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the nature of the display therein,

(h) In determining whether a matter or thing is or is not part of a work of artistic merit the Court shall consider the impugned material in the context of the whole work of which it is a part in the case of a book, film, video recording or broadcast which presents a discrete story. In the case of a magazine or any other composite or segmented work the court shall consider the impugned material in the context of the specific feature of which it is a part.

DISPLAY OF VISUAL PORNOGRAPHIC MATERIAL

159(3)(a) Everyone who displays visual pornographic material so that it is visible to members of the public in a place to which the public has access by right or by express or implied invitation is guilty of an offence punishable on summary conviction.

(b) No one shall be convicted of an offence under subsection (1) who can demonstrate that the visual pornographic material was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the display therein of visual pornographic material.

(c) For purposes of this section "visual pornographic material" includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, masturbation, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals, but does not include any matter or thing prohibited by subsections (1) and (2) of this section.

FORFEITURE OF MATERIAL

159(4) In any proceedings under section 159(1)(a) and (b), 159(2)(a) and (b), and 164, where an accused is found guilty of the offence the court shall order the offending matter or thing or copies thereof forfeited to Her Majesty in the Right of the Province in which proceedings took place, for disposal as the Attorney General may direct.

ABSENCE OF DEFENCE

159(5) It shall not be a defence to a charge under sections 159(1)(a) and 159(2)(a) that the accused was ignorant of the character of the matter or thing in respect of which the charge was laid.

DUE DILIGENCE DEFENCE

159(6) Nobody shall be convicted of the offences in sections 159(1)(b) and 159(2)(b) who can demonstrate that he used due diligence to ensure that there were no representations in the matter or thing which he sold, rented, offered for sale or rent, or had in his possession for purposes of sale or rent, which offended the section.

DIRECTORS

159(7) Where an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

DEFINITIONS

159(8) For purposes of this section, "sexually violent behaviour" includes

(i) sexual assault,

(ii) physical harm, including murder, assault or bondage of another person or persons, or self-infliction of physical harm, depicted for the apparent purpose of causing sexual gratification to or stimulation of the viewer.

5.2 Section 160

Section 160, the forfeiture provision of the *Code*, received little comment either at the public hearings or in the briefs submitted to the Committee. Such comment as there was tended to be general in nature. Some groups thought that section 160 should be repealed because it amounted to a general power to censor. Other groups thought that it should be retained and, in fact, used more often than it is.

The Committee is of the view that section 160 should be retained, at least insofar as tier one and tier two materials are concerned. In other words, taking forfeiture proceedings against the material itself should continue to be an alternative to a criminal charge with respect to material involving children, material advocating or encouraging the sexual abuse of children, pornography produced in such a way as to cause physical harm and sexually aggressive and degrading pornography. It would not be an option with respect to material that is in tier three. The reason for this distinction is explained below.

There are three reasons why we think that a provision like section 160 should remain in the *Criminal Code*. The first is that it provides a speedy way of resolving the question of whether or not material is in fact prohibited. The second is that it allows for that question to be resolved in proceedings in which there is no risk of anyone being convicted of a criminal offence. The third is that it provides private citizens with a useful and effective alternative to a private prosecution in situations in which, for one reason or another, the government has refused to act.

The second and third of these reasons require some explanation. In cases where it is clear that the material in question is prohibited, the Committee is of the view that criminal charges should be laid as quickly as possible. However, we agree with the opinion expressed by Judge Borins in *Regina* v. *Nicols* that, in cases where it is difficult to know whether the material in question is prohibited, there is an element of unfairness in proceeding by way of criminal charges. In those cases, which the committee hopes would be few and far between under the regime it is proposing, section 160 proceedings would be appropriate.

Insofar as the third reason is concerned, our public hearings revealed that there was a great deal of dissatisfaction about the reluctance of law enforcement officials in some provinces to take action against material that some

breasts or the genital parts of the body, or the lewd exhibition of the genitals.

Recommendation 15

The provinces and the municipalities should play a major role in regulation of live performances involving sexual activity that are not prohibited by the Criminal Code, through licensing, zoning and other similar means.

6.2 Section 170

Recommendation 16

Section 170 of the Criminal Code should be amended to add the following provision:

This section has no application to a theatre or other place licensed to present live shows

Section 170 penalizes nudity in a public place without lawful excuse. The purpose of this exemption is to ensure that live performances will be proceeded against under section 163 of the *Code*, rather than this provision. As we have seen in our analysis of the present *Criminal Code* provisions on pornography in Chapter 7 of Section II, section 170 has been held to be applicable to theatrical performances notwithstanding the existence of specific offences relating to theatrical performances in section 163. We are of the opinion that to leave it open to the Crown to proceed under section 170 would be to allow an unwarranted departure from the three tier structure which we have developed.

Footnotes

1. See Law Reform Commission of Canada, *Limits of the Criminal Law, Obscenity: A Test Case*, Ottawa, 1975; Department of Justice, *The Criminal Law in Canadian Society*, Ottawa, 1982.
2. *R. v. Keegstra*, November 5, 1984 [unreported] (Alta Queen's Bench).
3. *Ibid*, at 22.
4. *Ibid*.
5. *R. v. National News*, 1957, 118 C.C.C. 152 (Ont. Ct. of Appeal).